SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 232, 240, and 249

[Release Nos. 33–11138; 34–96492; File No. S7–20–21]

RIN 3235–AM86

Insider Trading Arrangements and Related Disclosures

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to the rule under the Securities Exchange Act of 1934 (''Exchange Act'') that provides affirmative defenses to trading on the basis of material nonpublic information in insider trading cases. The amendments add new conditions to this rule that are designed to address concerns about abuse of the rule to trade securities opportunistically on the basis of material nonpublic information in ways that harm investors and undermine the integrity of the securities markets. We are also adopting new disclosure requirements regarding the insider trading policies and procedures of issuers, the adoption and termination (including modification) of plans that are intended to meet the rule's conditions for establishing an affirmative defense, and certain other similar trading arrangements by directors and officers. In addition, we are adopting amendments to the disclosure requirements for director and executive compensation regarding equity compensation awards made close in time to the issuer's disclosure of material nonpublic information. Finally, we are adopting amendments to Forms 4 and 5 to require filers to identify transactions made pursuant to a plan intended to meet the rule's conditions for establishing an affirmative defense, and to require disclosure of bona fide gifts of securities on Form 4.

DATES:

Effective date: The final rules are effective on February 27, 2023.

Compliance dates: See Section III for further information on transitioning to the final rules.

FOR FURTHER INFORMATION CONTACT: Sean Harrison, Special Counsel, Office of Rulemaking, at (202) 551–3430, Division of Corporation Finance, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are amending:

Commission reference	CFR citation (17 CFR)
Regulation S–K [17 CFR 229.10 through 229.1305]	
Item 402	§ 229.402
Item 408	§ 229.408
Item 601	§ 229.601
Regulation S–T [17 CFR 232.11 through 232.903]	
Item 405	§ 232.405
Securities Exchange Act of 1934 (Exchange Act) [15 U.S.C. 78a *et seq.*]	
Rule 10b5–1	§ 240.10b5–1
Schedule 14A	§ 240.14a–101
Rule 16a–3	§ 240.16a–3
Form 4	§ 249.104
Form 5	§ 249.105
Form 20–F	§ 249.220f
Form 10–Q	§ 249.308a
Form 10–K	§ 249.310

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I. Introduction

Congress enacted the Federal securities laws to promote fair and transparent securities markets, ''avoid[ ] frauds,'' and ''substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.'' [1] The securities laws' antifraud prohibitions that proscribe certain insider trading, including Section 10(b) of the Exchange Act,[2] play an essential role in maintaining the fairness and integrity of our securities markets. The Securities and Exchange Commission (the ''Commission'') has long recognized that insider trading [3] and the fraudulent

[1] *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 151 (1972); accord *Lorenzo* v. *SEC,* 139 S. Ct. 1094, 1103 (2019).

[2] 15 U.S.C. 78j(b).

[3] ''Insider trading'' as used in this release refers to the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the

misuse of material nonpublic information by corporate insiders [4] harms not only individual investors but also undermines the foundations of our markets by eroding investor confidence.[5] Congress has recognized the harmful impact of insider trading on multiple occasions, such as by providing for enhanced civil penalties specifically for insider trading.[6]

Section 10(b) is one of the securities laws' primary antifraud provisions. This provision makes it unlawful ''[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.'' [7] The Supreme Court has recognized that the ''manipulative or deceptive device[s] or contrivance[s]'' prohibited by Section 10(b) and Rule 10b–5 include the purchase or sale of a security of any issuer on the basis of material nonpublic information about that security or its issuer, in breach of a duty owed directly, indirectly, or derivatively to the issuer of that security, to the shareholders of that issuer, or to any person who is the source of the material nonpublic information.[8]

The Commission adopted Rule 10b5–1 in 2000 to provide more clarity regarding the meaning of ''manipulative or deceptive device[s] or contrivance[s]'' prohibited by Section 10(b) and Rule 10b–5 with respect to trading on the basis of material nonpublic information.[9] At the time, Federal appellate courts diverged on the issue of what, if any, connection must be shown between a trader's possession of material nonpublic information and his or her trading to establish liability under Section 10(b) and Rule 10b–5. The Commission addressed this issue by providing that a purchase or sale of an issuer's security is on the basis of material nonpublic information about that security or issuer for purposes of Section 10(b) and Rule 10b–5 if the person making the purchase or sale *was aware of* the material nonpublic information when the person made the purchase or sale.[10] In addition, Rule 10b5–1(c) established an affirmative defense to liability under Section 10(b) and Rule 10b–5 for insider trading, which the Commission intended ''to cover situations in which a person can demonstrate that the material nonpublic information did not factor into the trading decision.'' [11] To that end, this defense provided that the trading was not made on the basis of material nonpublic information if the person can demonstrate, among other things, that the trade was made pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account, or a written plan for the trading of securities (each a ''trading arrangement'' and collectively ''trading arrangements'') adopted at a time that the person was not aware of material nonpublic information.[12] The Commission believed that this defense would ''provide appropriate flexibility to those who would like to plan securities transactions in advance, at a time when they are not aware of material nonpublic information, and then carry out those pre-planned transactions at a later time, even if they later become aware of material nonpublic information.'' [13] Rule 10b5–1(c)(2) provides a separate affirmative defense designed solely for non-natural persons (*e.g.,* entities) that trade.[14]

shareholders of that issuer, or to any other person who is the source of the material nonpublic information. *See* Rule 10b5–1(a).

[4] We use the terms ''insider'' and ''corporate insider'' in this release to refer to persons (other than issuers) for whom the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, would represent a breach of a fiduciary duty or a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of a security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information. *See* Rule 10b5–1(a).

[5] *See In re Cady, Roberts & Co.,* 40 S.E.C. 907, 1961 WL 60638, at *4 n. 15 (1961) (''A significant purpose of the Exchange Act was to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office.''); *see also United States* v. *O'Hagan,* 521 U.S. 642, 658 (1997) (The insider trading prohibition is consistent with the ''animating purpose'' of the Federal securities laws: ''to insure honest securities markets and thereby promote investor confidence.'')

[6] *See* Insider Trading Sanctions Act of 1984, Public Law 98–376, 98 Stat. 1264; Insider Trading and Securities Fraud Enforcement Act of 1988, Public Law 100–704, 102 Stat. 4677, codified at Section 21A of the Exchange Act, 15 U.S.C. 78u–1. Congress has enacted other laws that build on the insider trading prohibition. *See, e.g.,* Section 20(d) of the Exchange Act, 15 U.S.C. 78t(d); Section 20A of the Exchange Act, 15 U.S.C. 78t–1; STOCK Act, Public Law 112–105, 126 Stat. 291 (2012).

[7] Rule 10b–5, adopted pursuant to Section 10(b), prohibits the use of ''any device, scheme, or artifice to defraud''; the making of ''any untrue statement of a material fact'' or the ''omi[ssion]'' of ''a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading''; or ''any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person'' [17 CFR 240.10b–5]. In addition to potential insider trading liability, issuers—and those acting on their behalf—are also subject to other prohibitions under the Federal securities laws.

[8] *See Salman* v. *United States,* 137 S.Ct. 420, 425 n. 2 (2016) (explaining that, under the classical theory of insider-trading liability, an insider who trades in the securities of his corporation on the basis of material nonpublic information ''breaches a duty to, and takes advantage of, the shareholders of his corporation'' while, under the misappropriation theory, ''a person commits securities fraud 'when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information,' such as an employer or client''); *O'Hagan,* 521 U.S. at 651–53 (''Under the 'traditional' or 'classical theory' of insider trading liability, § 10(b) and Rule 10b–5 are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information,'' and ''the misappropriation theory outlaws trading on the basis of nonpublic information by a corporate 'outsider' in breach of a duty owed not to a trading party, but to the source of the information.''); *Chiarella* v. *United States,* 445 U.S. 222, 228–29 (1980); *see also* 15 U.S.C. 78u–1(a)(1); 17 CFR 240.10b5–2 (setting forth a non-exclusive definition of circumstances in which a person has the requisite duty for purposes of the ''misappropriation'' theory of insider trading liability). Liability for insider trading under Section 10(b) and Rule 10b–5 requires ''scienter,'' *i.e.,* ''an intent on the part of the defendant to deceive, manipulate or defraud.'' *Aaron* v. *SEC,* 446 U.S. 680, 686 & n. 5 (1980); *see also Selective Disclosure and Insider Trading,* Release No. 33–7881 (Aug. 15, 2000) [65 FR 51716 (Aug. 24, 2000)] (''2000 Adopting Release'') at 51727.

[9] *See* 2000 Adopting Release, *supra* note 8.

[10] *See* Rule 10b5–1(b) (emphasis added). The final amendments do not alter the ''awareness'' standard, which courts have held is ''entitled to deference.'' *United States* v. *Royer,* 549 F.3d 886, 899 (2d Cir. 2008) (applying *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984)), *cert. denied,* 558 U.S. 934, and 558 U.S. 935 (2009); *see also United States* v. *Rajaratnam,* 719 F.3d 139, 157–61 (2d Cir. 2013), *cert. denied,* 134 S. Ct. 2820 (2014). Under that standard, a person is aware of material nonpublic information if they know, consciously avoid knowing, or are reckless in not knowing that the information is material and nonpublic. *See SEC* v. *Obus,* 693 F.3d 276, 286–88, 293 (2d Cir. 2012); *United States* v. *Gansman,* 657 F.3d 85, 91 n.7, 94 (2d Cir. 2011). The decision in *Fried* v. *Stiefel Labs., Inc.,* 814 F.3d 1288, 1295 (11th Cir. 2016), which concerned a private action that did not involve Rule 10b5–1, erroneously suggests that a person must ''use'' the inside information to purchase or sell securities. *See also infra* at p. 45 n. 145.

[11] 2000 Adopting Release, *supra* note 8 at 51728.

[12] Rule 10b5–1 does not modify or address any other aspect of insider trading law. It also does not provide an affirmative defense for other securities fraud claims, such as a claim under Rule 10b–5 for an ''untrue statement of a material fact.'' 17 CFR 240.10b–5(b).

[13] 2000 Adopting Release, *supra* note 8 at 51728.

[14] *See* Rule 10b5–1(c)(2) [17 CFR 240.10b5–1(c)(2)]. This affirmative defense is available to a person other than a natural person that can demonstrate that the individual making the investment decision on behalf of the person was not aware of the material nonpublic information, and the person had implemented reasonable policies and procedures to prevent insider trading.

Since the adoption of the Rule 10b5–1(c)(1) affirmative defense, courts,[15] commenters,[16] and members of Congress [17] have expressed concern that traders have sought to benefit from its liability protections while trading securities opportunistically on the basis of material nonpublic information. Furthermore, some academic studies have found that corporate insiders trading pursuant to Rule 10b5–1 plans [18] consistently outperform the trading of corporate insiders that is not conducted under such plans. These studies raise concerns that corporate insiders may be trading under Rule 10b5–1 in ways that harm investors and undermine the integrity of the securities markets.[19] Practices that have raised public concern include corporate insiders adopting multiple overlapping plans and subsequently selectively canceling certain trades under such plans while they are aware of material nonpublic information (allowing such insiders to buy or sell securities under the plans that provide the most advantageous price) or commencing trades pursuant to a new plan shortly after the adoption of such plan (in some cases on the same day as said adoption, which, when combined with comparatively larger trades made closer in time to adoption of a plan, suggests that those trades may be on the basis of material nonpublic information).[20] In September 2021, the Commission's Investor Advisory Committee (''IAC'') [21] recommended that we ''take the necessary steps to establish meaningful guardrails around the adoption, modification, and cancellation of Rule 10b5–1 trading plans,'' by addressing certain gaps in the rule that allow corporate insiders to unfairly exploit informational asymmetries.[22]

On January 13, 2022, the Commission proposed several rule and form amendments to address potentially abusive practices associated with Rule 10b5–1 plans, grants of options and other equity instruments with similar features, and the gifting of securities.[23] We received over 160 comment letters on the proposals, which we discuss in context below.[24] Having considered these comments, we are adopting the following amendments, which include modifications from the proposal in response to the comments:

- Amend the affirmative defense of Rule 10b5–1(c)(1) to: (1) include a cooling-off period applicable to directors and ''officers'' (as defined by 17 CFR 240.16a–1(f) (''Rule 16a–1(f)'') and a shorter cooling off period applicable to all other persons other than the issuer; (2) include a certification condition for directors and officers; (3) limit the ability of persons other than the issuer to use multiple overlapping Rule 10b5–1 plans; (4) limit the ability of these persons to rely on the affirmative defense for a single-trade plan to one single-trade plan during any consecutive 12-month period; and (5) add a condition that all persons entering into a Rule 10b5–1 plan must act in good faith with respect to that plan; [25]
- Require: (1) quarterly disclosure by registrants regarding the use of Rule 10b5–1 plans and certain other trading arrangements by a registrant's directors and officers for the trading of its securities; and (2) annual disclosure regarding a registrant's insider trading policies and procedures in new Item 408 of Regulation S–K and corresponding amendments to Forms 10–Q and 10–K;
- Add a mandatory Rule 10b5–1(c) checkbox to Forms 4 and 5;
- Require certain tabular and narrative disclosures regarding awards

[15] District courts in private securities law actions have ''acknowledge[d] the possibility that a clever insider might 'maximize' their gain from knowledge of an impending [stock] price drop over an extended amount of time, and seek to disguise their conduct with a 10b5–1 plan.'' *In re Immucor Inc. Sec. Litig.,* 2006 WL 3000133, at *18 n.8 (N.D. Ga. Oct. 4, 2006); *accord Nguyen* v. *New Link Genetics Corp.,* 297 F. Supp. 3d 472, 494–96 (S.D.N.Y. 2018); *Freudenberg* v. *E*Trade Fin. Corp.,* 712 F. Supp. 2d 171, 200 (S.D.N.Y. 2010); *Malin* v. *XL Cap. Ltd.,* 499 F. Supp. 2d 117, 156 (D. Conn. 2007), *aff'd,* 312 F. App'x 400 (2d Cir. 2009).

[16] In Dec. 2020, the Commission proposed to amend Forms 4 and 5 to add a checkbox to permit filers to indicate that the reported transaction satisfied Rule 10b5–1. *See Rule 144 Holding Period and Form 144 Filings,* Release No. 33–10991 (Dec. 22, 2020) [85 FR 79936]. The Commission received several comment letters in response expressing concern about potential abuse of Rule 10b5–1. *See, e.g.,* letter from David Larcker et al. (Mar. 10, 2021), *https://www.sec.gov/comments/s7-24-20/s72420-8488827-229970.pdf;* letter from Council of Institutional Investors (''CII'') (Apr. 22, 2021), *https://www.sec.gov/comments/s7-14-20/s71420-8709408-236962.pdf;* letter from CII (Mar. 18, 2021), *https://www.sec.gov/comments/s7-24-20/s72420-8519687-230183.pdf.* In response to its Fall 2018 semiannual regulatory agenda, the Commission also received a letter requesting that the Commission amend Rule 10b5–1 to address potential abuses of Rule 10b5–1 plans. *See* letter from CII (Dec. 13, 2018), *https://www.sec.gov/comments/s7-20-18/s72018-4766666-176839.pdf.*

[17] *See, e.g.,* ''Waters and McHenry Introduce Bipartisan Legislation to Curb Illegal Insider Trading,'' U.S. House Committee on Financial Services, (Jan. 18, 2019) *https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=401725;* letter from Senators Elizabeth Warren, Sherrod Brown and Chris Van Hollen (Feb. 10, 2021), *https://www.warren.senate.gov/imo/media/doc/02.10.2021%20Letter%20from%20Senators%20Warren,%20Brown,%20and%20Van%20Hollen%20to%20Acting%20Chair%20Lee.pdf.*

[18] We use the terms ''Rule 10b5–1 plan'' and ''Rule 10b5–1 trading arrangement'' throughout this release to refer to a contract, instruction or written plan that is intended to satisfy the affirmative defense conditions of Rule 10b5–1(c)(1).

[19] *See, e.g.,* Alan D. Jagolinzer, *SEC Rule 10b5–1 and Insiders' Strategic Trade,* 55 Mgmt. Sci. 224 (2009); M. Todd Henderson et al., *Offensive Disclosure: How Voluntary Disclosure Can Increase Returns from Insider Trading,* 103 Geo. L.J. 1275 (2015); Taylan Mavruk & H. Nejat Seyhun, *Do SEC's 10b5–1 Safe Harbor Rules Need to Be Rewritten?,* 2016 Colum. Bus. L. Rev. 133 (2016); Artur Hugon & Yen-Jung Lee, *SEC Rule 10b5–1 Plans and Strategic Trade Around Earnings Announcements,* (2016), *https://ssrn.com/abstract=2880878.*

[20] *See, e.g.,* John P. Anderson, *Anticipating a Sea Change for Insider Trading Law: From Trading Plan Crisis to Rational Reform,* 2015 Utah L. Rev. 339 (2015); David Larcker et al., *Gaming the System: Three ''Red Flags'' of Potential 10b5–1 Abuse,* Stan. Closer Look Series (Jan. 2021) (''Gaming the System'') (noting from their analysis of a sample of sales transactions made pursuant to Rule 10b5–1 plans between Jan. 2016 and May 2020 that trades occurring within 30 days of adoption of a Rule 10b5–1 plan are approximately 50 percent larger than trades made six or more months later); *see also infra* note 40 and accompanying text.

[21] The IAC was established in Apr. 2012 pursuant to Section 911 of the Dodd-Frank Wall Street Reform and Consumer Protection Act [Pub. L. 111–203, sec. 911, 124 Stat. 1376, 1822 (2010)] to advise and make recommendations to the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, and initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace.

[22] *See* Recommendations of the Investor Advisory Committee Regarding Rule 10b5–1 Plans (Sept. 9, 2021) (''IAC Recommendations''), at *https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf.* The IAC also held a panel discussion regarding Rule 10b5–1 plans at its June 10, 2021 meeting. *See* IAC, *Meeting Minutes* (June 10, 2021), *https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac061021-minutes.pdf.*

[23] *See Rule 10b5–1 and Insider Trading,* Release No. 33–11013 (Jan. 13, 2022) [87 FR 8686 (Feb. 15, 2022)] (''Proposing Release'').

[24] The public comments we received are available at *https://www.sec.gov/comments/s7-20-21/s72021.htm.* Unless otherwise indicated, the comment letters cited herein are those received in response to the Proposing Release. One comment letter, dated Jan. 10, 2022, urged that the comment period for this proposal, among others, be extended to at least 60 days. *See* letter from Senator Pat Toomey and Representative Patrick McHenry. The Commission voted to issue the proposal at an open meeting on Dec. 15, 2021. The release was posted on the Commission website that day, and comment letters were received beginning that same date. On Jan. 13, 2022, the Commission voted to approve and issue a revised release that reflected certain, limited changes to the Paperwork Reduction Act and Initial Regulatory Flexibility Act Analysis sections. This proposal was posted on the Commission's website that same day, superseding the Dec. 15, 2021 release, and was published in the **Federal Register** on Feb. 15, 2022. The comment period closed on Apr. 1, 2022. We have considered all comments received since Dec. 15, 2021, and do not believe an extension of the comment period was necessary. Another comment letter raised concerns about the rulemaking process at the agency more broadly. *See* letter from Senator Thom Tillis. The process followed in adopting these amendments has complied with the Administrative Procedure Act and other legal requirements.

[25] We use the term ''the issuer'' in this release to refer to the issuer of the particular security or securities that are the subject of trades for which a person seeks the benefit of the affirmative defense under Rule 10b5–1(c)(1).

of options, stock appreciation rights (''SARs''), and/or similar option-like instruments granted to corporate insiders shortly before and immediately after the release of material nonpublic information in new paragraph (x) to Item 402 of Regulation S–K;

- Require registrants to tag the information specified by new Items 402(x), 408(a), and 408(b)(1) in Inline XBRL; and
- Require reporting of dispositions of equity securities by bona fide gifts on Form 4, rather than on Form 5.

These amendments are intended to improve investor confidence in the securities markets, and by extension enhance liquidity and capital formation, while continuing to provide appropriate flexibility to traders who would like to plan securities transactions in advance, when they are not aware of material nonpublic information. To achieve these goals, the amendments are designed to significantly reduce opportunities for corporate insiders to misuse Rule 10b5–1 to trade on material nonpublic information. Further, the amendments will increase transparency regarding the use of Rule 10b5–1 plans, issuers' insider trading policies and procedures, and their policies and practices with respect to awards of options, SARs, and/or similar option-like instruments close in time to the release of material nonpublic information.

II. Discussion of the Final Amendments

A. Amendments to Rule 10b5–1

Rule 10b5–1(c)(1) provides an affirmative defense to Section 10(b) and Rule 10b–5 liability if a person satisfies its conditions. First, the person must demonstrate that, before becoming aware of the material nonpublic information, they entered into a binding contract to purchase or sell the security, provided instruction to another person to execute the trade for the instructing person's account, or adopted a written plan for trading the securities.[26] Second, the person must demonstrate that the contract, instruction, or plan:

- Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;
- Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; or
- Did not permit the person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the contract, instruction, or plan, did exercise such influence must not have been aware of the material nonpublic information when doing so.[27]

Third, the person must demonstrate that the purchase or sale was pursuant to this contract, instruction, or plan.[28] A purchase or sale is not pursuant to a contract, instruction, or plan if, among other things, the person who entered into the contract, instruction, or plan altered or deviated from the contract, instruction, or plan (whether by changing the amount, price, or timing of the purchase or sale), or entered into or altered a corresponding or hedging transaction or position with respect to the securities.[29] Finally, this defense is only available if the contract, instruction, or plan ''was given or entered into in good faith and not as part of a plan or scheme to evade the prohibitions'' of Rule 10b–5.[30]

We are concerned that some corporate insiders use Rule 10b5–1 plans in ways that are not consistent with the objectives of the rule, and that harm investors and undermine the integrity of the securities markets. As the use of Rule 10b5–1 plans has become more widespread,[31] commentators have raised concerns that the design of Rule 10b5–1(c)(1) has enabled corporate insiders to trade on the basis of material nonpublic information while avoiding liability under Section 10(b) and Rule 10b–5.[32] Several commenters on the proposals reiterated those concerns.[33] These concerns stem from, among other things, the ability of corporate insiders to adopt multiple Rule 10b5–1 plans at a time when they lack material nonpublic information, and subsequently terminate some of the plans based on later-obtained material nonpublic information (notwithstanding the provision of the current affirmative defense that it is applicable only when the contract, instruction, or plan was entered into in good faith). For example, such plans might take financial positions that authorize trades at price points above and/or below the issuer's current stock price. When the insider becomes aware of material nonpublic information indicating likely future changes in the company's stock price, the insider could cancel the less advantageous plan or plans. Corporate insiders also could adopt multiple Rule 10b5–1 plans that direct trades only at price points above the current share price, anticipating that they will subsequently learn material nonpublic information that would reveal which of the plans would be most profitable. Then, when they become aware of material non-public information, they might cancel the less profitable ones. We are concerned that, in these situations, an insider's awareness of material nonpublic information may still ''factor into the trading decision,'' even if the insider's plans appear to satisfy the requirements of Rule 10b5–1(c)(1).[34]

Furthermore, multiple studies examining Rule 10b5–1 plans have identified potentially abusive activity, including when trades occur shortly after adoption of a plan. Some of these studies have observed, among other things, that trades that occur shortly after adoption of a Rule 10b5–1 plan demonstrate abnormal profitability, which suggests that some corporate insiders may be aware of material nonpublic information at the time of adoption of a Rule 10b5–1 plan that otherwise appears to meet the existing requirements of Rule 10b5–1.[35]

[26] Rule 10b5–1(c)(1)(i)(A).

[27] Rule 10b5–1(c)(1)(i)(B).

[28] Rule 10b5–1(c)(1)(i)(C).

[29] *Id.*

[30] Rule 10b5–1(c)(1)(ii).

[31] According to one survey, corporate insiders at 51% of S&P 500 companies used Rule 10b5–1 trading arrangements in 2015. *See* Morgan Stanley & Shearman & Sterling LLP, ''Defining the Fine Line: Mitigating Risk with 10b5–1 Plans'' (2018) *https://advisor.morganstanley.com/austin.cornish/documents/field/a/au/austin-cornish/Mitigating%20Risk%20with%2010b5-1%20Plans.pdf. Rule 10b5–1 plans are also used by issuers. See Skadden Insights: Share Repurchases* 4–6 (Mar. 16, 2020) *https://www.skadden.com/insights/publications/2020/03/share-repurchases (discussing the use of Rule 10b5–1 plans for issuer share repurchases).*

[32] *See* Tom McGinty & Mark Maremont, *CEO Stock Sales Raise Questions about Insider Trading,* Wall St. J. (June 29, 2022) (retrieved from Factiva database); *see also* Jean Eaglesham & Rob Barry, *Trading Plans Under Fire: Despite 2007 Warning, Experts Say Loopholes Remain for Corporate Insiders, Wall St. J.* (Dec. 13, 2012) (retrieved from Factiva database).

[33] *See, e.g.,* letters from American Federation of Labor and Congress of Industrial Organizations (''AFL–CIO''), Colorado Public Employees' Retirement Association (''CO PERA''), Council of Institutional Investors (''CII''), International Corporate Governance Network (''ICGN''), Better Markets (''Better Markets''), Public Citizen (''Public Citizen''), and North American Securities Administrators Association, Inc. (''NASAA'').

[34] *See* 2000 Release, *supra* note 8, at 51728.

[35] *See, e.g.,* Gaming the System, *supra* note 19 (observing that trades under Rule 10b5–1 plans systematically avoid losses and foreshadow considerable stock declines over the subsequent six months when: (1) trades executed under the plan occur as much as 60 days after plan adoption; or (2) a Rule 10b5–1 plan is adopted in a given quarter and begins trading before that quarter's earnings announcement); Yen-Jun Lee, *Insiders' Foreknowledge of Earnings Results and Rule 10b5–1 Sales Trades,* 38 J. Acctg., Auditing & Fin. 1, 9, 17, 19 (2020) (finding that insiders utilizing 10b5–1 plans tend to sell before negative earnings results, and that insiders particularly apt to engage in this

Continued

To address all of these concerns, we are amending Rule 10b5–1(c)(1) to apply a cooling-off period on persons other than the issuer, impose a certification requirement on directors and officers, limit the ability of persons other than the issuer to use multiple-overlapping Rule 10b5–1 plans, limit the use of single-trade plans by persons other than the issuer to one such single-trade plan in any 12-month period, and add a condition that all persons entering into a Rule 10b5–1 plan must act in good faith with respect to that plan.

1. Cooling-Off Period

a. Proposed Amendments

Rule 10b5–1(c)(1) does not currently impose a waiting period between the date that a trading plan is adopted and the date of the first transaction to be executed under the plan. A trader can therefore adopt a Rule 10b5–1 plan and execute a trade under it as early as the day of adoption. Investors and other commentators have suggested that requiring a minimum waiting period (a ''cooling-off period'') between the adoption of a Rule 10b5–1 plan and the date on which trading can commence reduces the risk that corporate insiders could benefit from any material nonpublic information of which they may have been aware when adopting the plan.[36] The Commission proposed to amend Rule 10b5–1(c)(1) to add the following cooling-off periods as conditions of the affirmative defense: (1) a minimum 120-day cooling-off period after the date of adoption of any Rule 10b5–1 plan (including adoption of a modified trading arrangement) by a director or ''officer'' (as defined in Rule 16a–1(f)) [37] before any purchases or sales under the new or modified trading arrangement; and (2) a minimum 30-day cooling-off period after the date of adoption of any Rule 10b5–1 plan by an issuer before any purchases or sales under the new or modified trading arrangement.

The Commission proposed the cooling-off periods to address concerns that some insiders may be adopting Rule 10b5–1 plans while aware of material nonpublic information, such as an issuer's upcoming quarterly earnings results, and then shortly thereafter trading before the information becomes public. We understand that corporate insiders are often aware of material nonpublic information. Although Rule 10b5–1(c)(1) precludes reliance on the affirmative defense when a person is aware of such information at the time of adoption of a Rule 10b5–1 plan, in practice, it is difficult for an outside party to determine whether the insider satisfied this condition.[38] With cognizance of this difficulty, some corporate insiders may use Rule 10b5–1 plans to execute trades on the basis of material nonpublic information and seek to assert the affirmative defense to avoid potential liability. The academic studies discussed above suggest that this may be the case as researchers have observed that trades made under Rule 10b5–1 plans that occur before the next earnings announcement are abnormally profitable.[39] Some corporate insiders also undertake other actions, such as cancellation of sales scheduled under Rule 10b5–1 plans ahead of favorable issuer disclosures, which appears consistent with an effort to exploit material nonpublic information.[40]

To address concerns that certain corporate insiders misuse Rule 10b5–1 by adopting and trading under trading arrangements despite their awareness of material nonpublic information, and in light of the evidence that suggests that trading arrangements that commence close in time to the plan's adoption and prior to an earnings announcement are more likely to result in abnormal returns, the Commission proposed requiring insiders to wait a period of time before trading under a new (or modified) plan could commence. Although many companies already impose such a cooling-off period for their own insiders,[41] not all do so, and, furthermore, among those that have a cooling-off period, there is little uniformity with respect to the duration of such periods. The Commission proposed a 120-day cooling-off period for officers and directors because such a period would extend beyond the fiscal quarter [42] in which the trading arrangement is established, meaning that trading generally would not occur under a Rule 10b5–1 plan adopted during a particular quarter until after the registrant announced its financial results for that quarter. Although the cooling-off period proposed by the Commission for officers and directors may have been longer than the cooling-off period used by many issuers or recommended by certain financial advisors, the Commission believed that the proposed duration would deter insiders from exploiting material nonpublic information for the relevant quarter. In addition, the Commission noted that a 120-day cooling-off period would align with the recommendations of a wide range of commentators.[43]

Under the proposed amendments, the cooling-off periods would have applied to directors and ''officers'' (as defined in Rule 16a–1(f)) of the issuer, as well as to an issuer that structures a share repurchase plan as a Rule 10b5–1 plan,

behavior are also more likely to begin trading within three months of establishing the plan); Mavruk & Seyhun, *supra* note 19, at 165 (observing that first trade pursuant to a Rule 10b5–1 plan showed abnormal profitability, suggesting that insiders set up Rule 10b5–1 plans when in possession of material nonpublic information); McGinty & Maremont, *supra* note 32; *see also* Jagolinzer, *supra* note 19, at 234–35 (finding that Rule 10b5–1 plans appear to allow insiders to trade close in time to earnings releases, and that there is a statistical relationship between plan adoption and upcoming negative news events). We provide additional discussion of these sources, including potential caveats about the data they analyze, *infra* Section V.B.1.

[36] *See* Rulemaking petition regarding Rule 10b5–1 Trading Plans, File No. 4–658 (Jan. 2, 2013) (''CII Rulemaking Petition'') at *https://www.sec.gov/rules/petitions/2013/petn4-658.pdf;* Alan D. Jagolinzer et al, *How the SEC Can and Should Fix Insider Trading Rules,* The Hill (Dec. 17, 2020), *https://thehill.com/opinion/finance/530668-how-the-sec-can-and-should-fix-insider-trading-rules;* IAC Recommendations, *supra* note 22.

[37] Exchange Act Rule 16a–1(f) provides that the term ''officer'' ''shall mean an issuer's president, principal financial officer, or principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer.''

[38] *See* Henderson et al., *supra* note 19, at 1289.

[39] *See* Gaming the System, *supra* note 19 (''[P]lans that execute a trade in the window between when the plan is adopted and that quarter's earnings announcement anticipate large losses and foreshadow considerable stock price declines'').

[40] *See* Jagolinzer, *supra* note 19, at 235 (observing that there is evidence ''that participants terminate sales plans before positive shifts in firm returns''); Mavruk & Seyhun, *supra* note 19, at 120, 125 (noting patterns of trading consistent with cancellation of some planned trades are abnormally profitable). Based on our review of the data sources used in the sources cited, we understand them to use the term ''earnings announcement'' to refer to the earliest of quarterly or annual reporting or other earnings announcements for which the issuer furnishes a corresponding Form 8–K.

[41] This practice suggests that many companies have concluded that in general a cooling-off period, rather than individualized efforts to identify instances where an executive is aware of material nonpublic information, strikes an appropriate balance of precision, cost of implementation, and investor confidence.

[42] Quarters are about 90 days long and public reporting companies are required to disclose their quarterly results no later than 40 or 45 days after the end of their fiscal quarter, depending on their filing status. *See* 17 CFR 249.308(a). Nevertheless, companies on average disclose their quarterly results within 30 days of the end of the fiscal quarter. *See* Morgan Stanley & Shearman & Sterling LLP, *supra* note 29.

[43] *See* IAC Recommendations, *supra* note 22 (recommending a cooling off period of four months); *Gaming the System, supra* note 12, at 3 (recommending a minimum cooling-off period and noting that ''[a] cooling-off period of four to six months . . . is supported by the data in our sample''); letter from Senators Elizabeth Warren, Sherrod Brown and Chris Van Hollen *supra* note 17 (recommending a cooling off period of four to six months).

although in the latter case the Commission proposed a shorter, 30-day cooling-off period. This requirement would prevent directors, officers, and issuers who might be aware of material nonpublic information from adopting or modifying a trading arrangement and trading immediately pursuant to the arrangement. The proposed cooling-off period also was intended to discourage issuers, directors, and officers from selectively terminating or cancelling a planned trade under a Rule 10b5–1 plan because any subsequent trades upon the adoption of a new or modified plan would also be subject to a new cooling-off period.

The Commission noted that applying a cooling-off period to directors and ''officers'' as defined in Rule 16a–1(f) was appropriate because such individuals are more likely than others to be aware of material nonpublic information in the general course of events, and also more likely to be involved in making or overseeing key corporate decisions that have the potential to affect the issuer's stock price, including decisions about the timing of the disclosure of such information.[44] The Commission also requested comment, however, on whether the Rule 16a–1(f) definition was the appropriate definition of ''officer'' for purposes of the proposed amendment and further inquired whether the cooling-off period should apply to all traders who rely on the Rule 10b5–1(c)(1) affirmative defense.[45]

In addition, the Commission stated that applying a cooling-off period to issuers may help address the concern that issuers may conduct stock buybacks while aware of material nonpublic information. For example, corporate insiders who are aware of positive material nonpublic information can cause the issuer to buy its stock at a lower price from current shareholders who are unaware of this information because, once the information is publicly disclosed, the issuer's share price may increase. The Commission proposed a 30-day cooling-off period for issuers to help reduce the likelihood of this potential abuse and promote investor confidence. The Commission also proposed a note to Rule 10b5–1(c)(1) stating that any modification or amendment to a prior contract, instruction, or written plan would be deemed to be the termination of such prior contract, instruction, or written plan, and the adoption of a new contract, instruction, or written plan.[46]

b. Comments on the Proposed Amendments

Commenters expressed a range of views on the proposed cooling-off periods. Many commenters expressed general support for a cooling-off period for directors and officers.[47] Several of these commenters supported the proposed cooling-off period of 120 days.[48] For example, one commenter agreed that the proposed 120-day cooling-off period would deter officers and directors from adopting or modifying a Rule 10b5–1 plan while aware of material nonpublic information and prevent insiders from gaming Rule 10b5–1 plans by opportunistically canceling trades or modifying plans.[49] In addition, in expressing the view that this duration was appropriate, another commenter stated the concern that, given that directors and officers are more likely than other traders to be aware of material nonpublic information and involved in making or overseeing key corporate decisions that could affect the stock price, they could be involved with decisions regarding the timing of a range of issuer disclosures, including disclosures related to a merger or acquisition, departure of a named executive officer, or the financial statements.[50] Finally, another commenter, who did not support the proposed duration of the cooling-off period, nonetheless asserted that a cooling-off period would increase investor confidence that insiders were not using Rule 10b5–1 plans to benefit from nonpublic material information.[51]

At the same time, many commenters, including several commenters that expressed support for a cooling-off period for directors and officers, contended that the duration of the proposed cooling-off period was unnecessarily long.[52] For example, some of these commenters asserted that a 120-day cooling-off period would discourage insiders from adopting Rule 10b5–1 plans [53] and therefore result in larger, more concentrated volumes of insider-directed trades taking place during trading windows rather than being spread out under a Rule 10b5–1 plan, which could increase market volatility.[54]

Some of these commenters recommended alternative durations for the cooling-off period for directors and officers.[55] Shorter alternatives ranged from a cooling-off period of 30 days

[44] *See O'Hagan,* 521 U.S. at 651–52; *Chiarella,* 445 U.S. at 227; *Steginsky* v. *Xcelera Inc.,* 741 F.3d 365, 370 n.5 (2d Cir. 2014); *see also Colby* v. *Klune,* 178 F.2d 872 (2d Cir. 1949).

[45] Proposing Release, *supra* note 22, at 17.

[46] The proposed note would have codified prior Commission guidance on Rule 10b5–1(c)(1)(i)(C). *See infra* note 122 and accompanying text.

[47] *See, e.g.,* letters from American Federation of Labor and Congress of Industrial Organizations (''AFL–CIO''), Better Markets, Colorado Public Employees' Retirement Association (''CO PERA''), Council of Institutional Investors (''CII''), Cravath, Swaine & Moore LLP (''Cravath''), Davis Polk & Wardwell LLP (''Davis Polk''), DLA Piper (''DLA''), Fenwick & West (''Fenwick''), International Corporate Governance Network (''ICGN''), Craig M. Lewis et al. (''Lewis''), Manulife Financial Corp. (''Manulife''), Committee on Securities Law of the Business Law Section of the Maryland State Bar (''MD Bar''), North American Securities Administrators Association, Inc. (''NASAA''), New York City Comptroller (''NYCC''), NYSE Group, Inc. (''NYSE''), PNC Financial Services Group, Inc. (''PNC''), Public Citizen, Anthony O'Reilly (''O'Reilly''), Securities Industry and Financial Markets Association (''SIFMA'') (letter dated Apr. 1, 2022, from Kevin Carroll, ''SIFMA 3''), and Sullivan & Cromwell LLP (''Sullivan'').

[48] *See, e.g.,* letters from AFL–CIO, CII, CO PERA, ICGN, Public Citizen, O'Reilly, and NASAA.

[49] *See* letter from CII.

[50] *See* letter from ICGN.

[51] *See* letter from Manulife.

[52] *See, e.g.,* letters from Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (''ABA''); ACCO Brands Corp. (''ACCO''); Chevron Corp. (''Chevron''); Cravath; Davis Polk; DLA; Dow Inc. (''Dow''); Empire State Realty Trust (''Empire Trust''); FedEx Corporation (''FedEx''); Fenwick; HR Policy Association Center on Executive Compensation (''HRPA''); Jones Day; Kirkland & Ellis (''Kirkland''); Manulife, National Association of Manufacturers (''NAM''); National Venture Capital Association (''NVCA''); New York City Bar Association (''NYC Bar''); NYSE; Paul, Weiss, Rifkind, Wharton & Garrison LLP (''Paul Weiss''); PNC; Quest Diagnostics Inc. (''Quest''); William Quinn (''Quinn''); US Chamber of Commerce (letter dated Apr. 1, 2022) (''Chamber of Chamber 2''); American Property Casualty Insurance Association, American Securities Association, Center On Executive Compensation, U.S. Chamber of Commerce, Nareit, National Association of Manufacturers, and NIRI: The Association for Investor Relations (''Coalition Letter''); Shearman & Sterling LLP (''Shearman''); SIFMA 3; Simpson Thacher & Bartlett LLP (''Simpson''); Sullivan; and Wilson, Sonsini, Goodrich & Rosati (''Wilson Sonsini'').

[53] *See* letter from NYC Bar. This comment letter was initially submitted in Apr. 2022 and posted on the Commission website on Oct. 2022. The delayed posting of this comment letter to the website is unrelated to the technological error that resulted in the Oct. 2022 reopening of the comment files of certain other Commission releases. *See Resubmission of Comments and Reopening of Comment Periods for Several Rulemaking Releases Due to a Technological Error in Receiving Certain Comments,* Release Nos. 33–11117, 34–96005, IA–6162, IC–34724; File Nos. S7–32–10, S7–18–21, S7–21–21, S7–22–21, S7–03–22, S7–08–22, S7–09–22, S7–10–22, S7–13–22, S7–16–22, S7–17–22, S7–18–22 (Oct. 7, 2022). In Apr. 2022, the submitter of this comment letter withdrew the comment letters submitted on this rule and the proposing release for another rule and submitted replacement comment letters. Staff posted the replacement comment letter on the other rule, but inadvertently failed to post the replacement comment letter for the Proposing Release until the submitter of the comment letter again contacted Commission staff in Oct. 2022.

[54] *See, e.g.,* letters from Chamber of Commerce 2, Davis Polk, DLA, Fenwick, NYSE, SIFMA 3, Simpson, and Sullivan.

[55] *See, e.g.,* letters from ACCO, Chamber of Commerce 2, Dow, DLA, Fenwick, NAM, NYSE, Paul Weiss, Quinn, Simpson, and Sullivan.

from the date of adoption of a Rule 10b5–1 plan,[56] which some commenters asserted is a common practice many issuers have implemented,[57] to a maximum cooling-off period of 90 days after the adoption of a Rule 10b5–1 plan.[58] Other commenters recommended shortening the cooling-off period, in part, by taking into account when the issuer publishes its earnings announcement or results. These commenters suggested that the cooling-off period last until: (1) the earlier of 60 days or one business day after the earnings release for the fiscal quarter of adoption; [59] (2) the earlier of 60 days or 48 hours after the next release of annual or quarterly results; [60] (3) 90 days or fewer or, if the officer or director enters into the Rule 10b5–1 plan within five trading days of an earnings release, 30 days; [61] (4) the earlier of 90 days or the publication of results for the quarter during which the plan was adopted; [62] (5) one trading day after the next earnings announcement covering at least one fiscal quarter and filed or furnished with an Exchange Act report; [63] and (6) the earlier of 30 days or the release of quarterly earnings with an exception for plans entered into within five business days after an earnings release.[64] Another commenter, however, urged the Commission to consider lengthening the cooling-off period to 180 days.[65]

Among commenters who recommended that we link the end of the cooling-off period to the release of earnings or other financial results, most did not specify whether the end of the cooling-off period should be tied to the publication of such results in the form of a quarterly report on Form 10–Q or annual report on Form 10–K, or instead to the announcement of such results in a Form 8–K, that is filed or furnished with the Commission.[66] Some commenters suggested that the end of the cooling-off period should be tied to the ''next'' (relative to the adoption or modification of the Rule 10b5–1 plan) such release; [67] we understand that if an earnings announcement accompanied by a Form 8–K is made, it typically precedes the filing of a Form 10–Q or Form 10–K. One commenter suggested that the end of the cooling-off period should be tied to the earlier of the release of financial results or the start of the issuer's open trading window under the insider's trading policy.[68]

Finally, some commenters asked the Commission to provide exceptions from the cooling-off period. For example, one commenter asked that the cooling-off period not apply in cases of financial hardship for the officer or director, such as an unanticipated financial liability that is unrelated to the trading of securities.[69] Another commenter asked the Commission to exclude venture capital funds from the cooling-off period condition, or to provide a shorter cooling-off period for venture capital funds.[70]

Many commenters opposed a cooling-off period for issuers,[71] largely due to issuers' use of Rule 10b5–1 plans in connection with share repurchase plans under Exchange Act Rule 10b–18.[72] One of these commenters stated that Rule 10b5–1 plans allow issuers to more effectively coordinate and execute their share repurchases during open and closed trading windows.[73] Given this practice, several commenters contended that the proposed cooling-off period would limit the usefulness of Rule 10b5–1 plans and impede the ability of issuers to effectively carry out share repurchases and other transactions used by issuers to manage their capital.[74] Some of these commenters stated the concern that a cooling-off period for issuers could increase market volatility as issuer repurchase activity would be limited to much shorter trading windows.[75]

In addition, several of these commenters asserted that a cooling-off period for issuers was unnecessary because existing safeguards under the Federal securities laws and market practices protect investors from issuer abuse of Rule 10b5–1 plans.[76] Some commenters contended the Commission did not set forth any evidence of issuers abusing Rule 10b5–1 trading arrangements to justify this cooling-off period.[77]

In contrast, other commenters supported a cooling-off period for issuers.[78] One of these commenters contended that the proposed 30-day period was too short to address the concerns underlying the proposal and advocated for a 120-day cooling-off period for issuers, similar to the proposed cooling-off period for directors and officers.[79]

Several commenters urged the Commission to clarify that immaterial or administrative modifications to an existing Rule 10b5–1 trading arrangement would not constitute a modification that triggers a new cooling-off period.[80] For example, some commenters asserted that modifications should not trigger the cooling-off period unless they address the pricing, amount of securities to be purchased or sold, and/or the timing of purchases or sales.[81] In addition, another commenter urged the Commission not to trigger a new cooling-off period upon a modification of a Rule 10b5–1 plan.[82]

We also received comment on whether some or all of the proposed amendments should apply only to directors and officers, as defined in Rule

[56] *See, e.g.,* letters from ACCO, Chamber of Commerce 2, DLA, Fenwick, NYC Bar, NYSE, Paul Weiss, Quinn, and Sullivan.

[57] *See, e.g.,* letters from Chamber of Commerce 2, NYSE, Paul Weiss, and Simpson.

[58] *See, e.g.,* letters from Chevron, Dow, and Cleary, Gottlieb, Steen & Hamilton LLP (''Cleary'').

[59] *See* letter from ABA.

[60] *See* letter from Manulife.

[61] *See* letter from Dow.

[62] *See* letter from Cleary.

[63] *See* letter from Davis Polk.

[64] *See* letter from NAM.

[65] *See* letter from Senators Elizabeth Warren, Chris Van Hollen, Tammy Baldwin, and Bernard Sanders (''Sen. Warren et al.'').

[66] *See, e.g.,* letters from ABA, Cleary, and PNC.

[67] *See, e.g.,* letters from Davis Polk, DLA, and Simpson.

[68] *See* letter from DLA; *see also* letter from Quest (suggesting that there is no incremental material nonpublic information disclosed in a Form 10–Q when an issuer has already released an earnings announcement).

[69] *See* letter from Wilson Sonsini.

[70] *See* letter from NVCA.

[71] *See, e.g.,* letters from the Bank Policy Institute and the American Bankers Association (''BPI''), Home Depot, Inc. (''Home Depot''), Dow, Chevron, Empire Trust, FedEx, International Bancshares Corporation (''IBC''), Manulife, NYSE, HudsonWest LLC (''HudsonWest''), Guzman & Company (''Guzman''), Quest, Coalition Letter, Chamber of Commerce 2, HRPA, Lewis, NAM, NVCA, NYC Bar, Society for Corporate Governance (''SCG''), SIFMA (letter dated Apr. 1, 2022, from Joseph P. Corcoran) (''SIFMA 2''), ABA, Cravath, Davis Polk, Dorsey & Whitney LLP (''Dorsey''), Fenwick, Jones Day, Kirkland, Paul Weiss, Simpson, Shearman, Sullivan, Wilson Sonsini, and Vistra Corp. (''Vistra'').

[72] 17 CFR 240.10b–18. Rule 10b–18 provides issuers with a safe harbor from liability for manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act [15 U.S.C. 78i(a)(2) and 78j(b)] when they repurchase their common stock in the market in accordance with the Rule's manner, timing, price, and volume conditions.

[73] *See* letter from Simpson.

[74] *See, e.g.,* letters from BPI, Home Depot, Dow, Chevron, FedEx, Quest, Chamber of Commerce 2, Coalition Letter, NAM, SCG, SIFMA 2, ABA, Cravath, Davis Polk, Jones Day, Paul Weiss, Simpson, Shearman, and Wilson Sonsini.

[75] *See, e.g.,* letters from NYSE and Sullivan.

[76] *See, e.g.,* letters from Cravath, Davis Polk, Dow, FedEx, Fenwick, Lewis, NAM, Paul Weiss, Quest, SCG, SIFMA 2, and Wilson Sonsini.

[77] *See, e.g.,* letters from BPI, Davis Polk, Cravath, and Wilson Sonsini.

[78] *See, e.g.,* letters from CO PERA, CII, ICGN, NYCC, Better Markets, Public Citizen, Stern Tannenbaum Bell LLP (''Stern''), ACCO, PNC, NASAA, and Sen. Warren et al.

[79] *See* letter from NASAA.

[80] *See, e.g.,* letters from Chamber of Commerce 2, NAM, SIFMA 2, ABA, Cleary, Cravath, Davis Polk, DLA, Fenwick, and Sullivan.

[81] *See, e.g.,* letters from Cravath, Cleary, Davis Polk, and DLA.

[82] *See* letter from NAM.

16a–1(f), or whether they should also apply to other insiders or traders more broadly. Several commenters indicated that the proposed cooling-off period and limitations on overlapping and single-trade plans should apply to all traders or all natural persons.[83] One of these commenters generally observed that the limitations should apply broadly because other officers and employees can potentially have access to and trade on material nonpublic information.[84] Another commenter suggested that any individual involved in a company's trading program or ''corporate decisions'' should be subject to the cooling-off requirement.[85] Two commenters also suggested that we extend the new Item 408(a) reporting obligation to cover any employee who adopts a 10b5–1 plan.[86]

Other commenters opposed any expansion of the amendments beyond directors and Rule 16a–1(f) officers.[87] Some of these commenters agreed with our observation that these officers were those most likely to have access to material nonpublic information.[88] Two commenters argued that trading by employees other than Rule 16a–1(f) officers is unlikely to adversely affect financial markets because of the limited authority of these employees over corporate decisions.[89] One of these commenters further observed that because other employees do not generally file Form 4, their trading activities are unlikely to affect public confidence in a company's securities.[90] Two other commenters suggested that non-executive employees are particularly likely to need to liquidate and diversify their company stock holdings, and so would be disproportionately harmed by limitations such as the cooling-off period.[91] One commenter also stated that making the affirmative defense more difficult to establish would reduce the likelihood that companies would require their non-executive employees to use Rule 10b5–1 plans, reducing the benefits of the rule.[92]

c. Final Amendment

After consideration of the comments, we are adopting a modified cooling-off period that will apply to all persons other than the issuer, with directors and ''officers'' (as defined in Rule 16a–1(f)) [93] of the issuer subject to a longer cooling-off period than applies to other persons (other than the issuer) who rely on the Rule 10b5–1(c)(1) affirmative defense.

Under the final rule, a director or ''officer'' (as defined in Rule 16a–1(f)) who adopts (including a modification of) a Rule 10b5–1 plan would not be able to rely on the Rule 10b5–1 affirmative defense unless the plan provides that trading under the plan will not begin until the later of (1) 90 days after the adoption of the Rule 10b5–1 plan or (2) two business days following the disclosure of the issuer's financial results in a Form 10–Q or Form 10–K for the fiscal quarter in which the plan was adopted or, for foreign private issuers, in a Form 20–F or Form 6–K that discloses the issuer's financial results (but in any event, the required cooling-off period is subject to a maximum of 120 days after adoption of the plan).[94]

This cooling-off period is intended to deter opportunistic trading that may be occurring under the current rule and, by extension, as noted by commenters, it may increase investor confidence that directors and officers are not using Rule 10b5–1 plans for such purposes.[95] The purpose of a cooling-off period is to provide a separation in time between the adoption of the plan and the commencement of trading under the plan so as to minimize the ability of an insider to benefit from any material nonpublic information. In addition, academic studies documenting abnormal trading results indicate that opportunistic trading may be occurring notwithstanding current Rule 10b5–1(c)(1) and that certain corporate insiders are earning profits unavailable to others.[96] For example, directors, officers, and other corporate insiders commonly have access to preliminary quarterly financial data before it is released to the public. As academic commentary has observed, ''[q]uarterly earnings announcements . . . offer the most important and frequent dates of material information disclosure by firms.'' [97] A cooling-off period could serve to avoid a situation in which, for example, an insider adopts a Rule 10b5–1 plan while aware of likely directional trends in quarterly results and trades under the plan before the disclosure of such information.

In addition, as the Proposing Release indicated, we are concerned that this type of opportunistic trading could occur in contexts other than in connection with quarterly results. For example, as a commenter noted, corporate insiders may be aware of material nonpublic information related to other types of upcoming events, such as a potential merger, acquisition, or departure of a named executive officer, and, with such information, adopt a Rule 10b5–1 plan and trade under it before that information is made public.[98]

Accordingly, the cooling-off period for officers and directors that we are adopting includes both a fixed (90-day) and a variable (two business days after the disclosure of the issuer's financial results) component. This cooling-off period is targeted at reducing information asymmetries in general as well as providing separation in time between adoption of the plan and trading under the plan so as to reduce the ability of corporate insiders to trade on material nonpublic information.

The approach we are adopting takes into account considerations raised by commenters. Some commenters observed that we could accomplish our goals by linking the end of the cooling-off period to the release of earnings results for the current quarter instead of a fixed period of days, and suggested that we adopt a variable cooling-off period that ends one or two business days following the issuer's next reporting of quarterly results.[99] Others suggested that we adopt a cooling-off period that would be the earlier of this date or some other fixed period, such as

[83] *See* letters from Better Markets, NASAA; *see also* letter from Sen. Warren et al. (suggesting the limitation apply to ''all employees'').

[84] *See* letter from NASAA.

[85] *See* letter from ICGN.

[86] *See* letters from BrilLiquid LLC (''BrilLiquid'') and NASAA.

[87] *See* letters from Chamber of Commerce 2, CII, Cravath, Davis Polk, NAM, SCG, and SIFMA.

[88] *See* letters from CII, Cravath, and SIFMA.

[89] *See* letters from Cravath and Davis Polk.

[90] *See* letter from Davis Polk.

[91] *See* letters from Chamber of Commerce 2 and NAM.

[92] *See* letter from Davis Polk.

[93] We are declining the request from one commenter to adopt a definition of ''officer or director'' that would expressly exclude certain venture capital funds whose partners may serve as a director on the board of an issuer. As we have noted, Rule 10b5–1 does not alter the law of insider trading and any potential liability under the circumstances described by the commenter would be determined according to established principles. We also are not convinced that the business circumstances of such a director are unique and thus warrant a distinctive set of affirmative defense requirements. We further note that Rule 10b5–1(c)(2) can provide an alternative affirmative defense for persons other than natural persons.

[94] The good faith requirement in Rule 10b5–1(c)(1)(ii) will continue to apply as a condition of the affirmative defense.

[95] *See, e.g.,* letters from AFL–CIO, CII, and Manulife.

[96] *See supra* note 35 and accompanying text.

[97] *See* U. Ali & D. Hirshleifer, *Opportunism as a Firm and Managerial Trait: Predicting Insider Trading Profits and Misconduct,* 126 J. Fin. Econ. 490, 491 (2017).

[98] *See* letter from ICGN; *see also* Henderson et al., *supra* note 19, at 1301 (noting that 25% of the price changes observed in their data are the results of corporate news events other than earnings).

[99] *See supra* note 63.

60 days.[100] In addition, while several commenters supported a 120-day cooling-off period,[101] other commenters expressed concerns that this duration would discourage the use of Rule 10b5–1 plans.[102] We agree that, in some cases, a full 120-day cooling-off period would be longer than needed to prevent the opportunistic trading with which we are concerned. Therefore, we have shortened the cooling off period for officers and directors from 120 days to the later of 90 days or the second business day following disclosure of the issuer's financial results for the fiscal quarter in which the plan was adopted.[103] This will result in a shortened cooling-off period, relative to what was proposed, when such results are disclosed sooner than 120 days following adoption of the plan.

In addition, to enhance clarity, the final rule provides that an issuer will be considered to have disclosed its financial results at the time it files a Form 10–Q or Form 10–K, or, in the case of foreign private issuers, files a Form 20–F or furnishes a Form 6–K that discloses the financial results. We disagree with commenters who suggested that there cannot be material nonpublic information contained in a Form 10–Q or similar filing when the issuer has already announced its earnings results.[104] For example, some academic researchers have found that information in periodic filings affects stock prices for issuers that also made an earlier earnings announcement for the same quarter.[105]

Further, the cooling-off period for officers and directors includes a two-business day period following the disclosure of the issuer's financial results, which provides a short interval for investors and other market participants to analyze those results.[106] Although some commenters suggested that the next business day after results are released would be adequate to ensure that market participants have access to the same information as the corporate insider, we have adopted a cooling-off period that extends to the second business day after results are released, as other commenters suggested.[107] We disagree with those commenters who suggested that a next-day approach would provide all market participants with the same access as the corporate insider, as it may be challenging to obtain and analyze the full details of an issuer's quarterly results within one day. In some cases, allowing trading such a short period after release would effectively authorize the director or officer to trade in the first minutes after that information's availability to the market.

While some commenters suggested that the cooling-off period need only take into account the publication of an issuer's quarterly results, we find that including a minimum duration of 90 days for the cooling-off period is necessary to deter the full scope of opportunistic trading that we intend to address and appropriately balances the comments, academic studies, and the purpose of an affirmative defense. This minimum period is a reduction from the proposed 120-day cooling-off period, in response to comments received stating that the length of the proposed cooling-off period could discourage corporate insiders from using Rule 10b5–1 plans, although we acknowledge that some of these commenters requested a shorter period than we are adopting.[108] Given that directors and officers may be aware of material nonpublic information related to upcoming events other than quarterly results, a cooling-off period based solely on the timing of the publication of quarterly results would be too narrow to accomplish the objective of assuring that trading under these plans is not on the basis of material nonpublic information.[109] For example, as noted above, directors and officers may be aware of material nonpublic information about a potential merger, acquisition, or departure of a named executive officer.[110]

Further, a cooling-off period that is linked only to the release of the next quarterly results (plus two business days) would in some cases cause the time between plan adoption and initial trading to be very short, such as two to three days, raising the risk that directors and officers could easily adopt and trade under a Rule 10b5–1 plan while aware of material nonpublic information that is unrelated to the earnings information that has been released. For all of these reasons, we are requiring a minimum cooling-off period of 90 days for officers and directors regardless of the date of the release of the subsequent quarter's results.[111]

We acknowledge that the cooling-off period that we are adopting for directors and officers is longer than many of the cooling-off periods recommended by several commenters and that academic studies do not provide a precise estimate of the length of time a cooling-off period should be to prevent insiders from realizing abnormal returns on their trades.[112] However, we have tailored the cooling-off period to provide a greater separation in time between plan adoption and commencement of trading

[100] *See supra* note 59.

[101] *See, e.g.,* letters from AFL–CIO, CII, CO PERA, ICGN, Public Citizen, O'Reilly, and NASAA.

[102] *See, e.g.,* letters from Chamber of Commerce 2, Davis Polk, DLA, Fenwick, SIFMA 3, Simpson, and Sullivan.

[103] If financial results are disclosed more than 120 days after adoption of the plan, 120 days would be the maximum duration of the required cooling-off period. In those circumstances, we agree with commenters who asserted that a 120-day cooling-off period would be an appropriate duration to better ensure that a corporate insider would not benefit from material nonpublic information related to earnings. *See, e.g.,* letters from AFL–CIO, and CII. The final rule would not foreclose issuers that may choose to impose a longer cooling-off period.

[104] *See* letters from DLA and Quest.

[105] *See* Erik R. Holzman et al., *Is All Disaggregation Bad for Investors? Evidence from Earnings Announcements,* 26 Rev. Acctg. Studies 520, 540–41 (2021); Yifan Li et al., *Opportunity Knocks But Once: Delayed Disclosure of Financial Items in Earnings Announcements and Neglect of Earnings News,* 25 Rev. Acctg. Studies 159 (2020); Bin Miao et al., *Limited Attention, Statement of Cash Flow Disclosure, and the Valuation of Accruals,* 21 Rev. Acctg. Studies 473 (2016). Some earlier work finds that there are incremental market responses to Form 10–K filings but not to Form 10–Q filings. Edward Xuejun Li & K. Ramesh, *Market Reaction Surrounding the Filing of Periodic SEC Reports,* 84 Acctg. Rev. 1171 (2009).

[106] *See SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 854 & n.18 (2d Cir. 1968) (noting that the ''permissible timing of insider transactions after disclosures of various sorts is one of the many areas of expertise for appropriate exercise of the SEC's rule-making power'').

[107] *See supra* note 63.

[108] *See, e.g.,* letters from Fenwick, Simpson, and Sullivan.

[109] *See* letter from ICGN.

[110] *See* Jagolinzer, *supra* note 18, at 234 (finding that 10b5–1 plan adoption is associated with adverse news events occurring an average of 72.2 days after adoption).

[111] We also note that, consistent with this view, many commenters stated that a cooling-off period for a fixed period of days (*i.e.,* one which in some cases would necessarily extend beyond release of the next quarter's results) is a common industry practice.

[112] One study found that abnormal returns persist on average among all observed Rule 10b5–1 plans for up to 60 days after plan adoption, but that abnormal returns for single-trade plans, which represent about half of the observed Rule 10b5–1 plans, persist for 120 days or more. *See* Gaming the System, *supra* note 20, at 2–3. The authors conclude that a cooling-off period of four to six months would be ''supported by our data,'' *id.* at 3, although the study did not consider whether this would still be the case if there were also limits on single-trade plans. A second study consistently found abnormal returns for the 60-day period after a Rule 10b5–1 plan is adopted, and found such returns under two of the three statistical methods employed for the 90-day period after plan adoption. *See* McGinty & Maremont *supra* note 32. Another study reported evidence that insiders trade on information that on average has value for between three and six months, and the authors suggest that a cooling-off period of that length would curtail these trades. *See* Mavruk & Seyhun, *supra* note 19 at 136, 163, 179. And another study found that insiders continue to earn abnormal returns after the fifth planned trade over a 350-day period, suggesting that Rule 10b5–1 plans do not on average involve very short-run information. *See* Jagolinzer, *supra* note 19, at 234–35. It also found that Rule 10b5–1 plans are statistically associated with negative news items occurring an average of 72.2 days after a plan is established.

under the plan to better ensure that the affirmative defense is available only in situations in which material nonpublic information, including information other than earnings information, did not factor into the trading decision. Finally, although a commenter recommended increasing the length of the cooling-off period,[113] we decline to do so to minimize the risk of excessively long cooling-off periods, which, as commenters stated, may discourage the use of Rule 10b5–1 plans.

Moreover, while we recognize that some issuers impose their own cooling-off periods, those cooling-off periods are voluntary and vary in duration. Including a cooling-off period as a condition of the affirmative defense will provide greater consistency for Rule 10b5–1 plans and thereby help address the investor protection concerns that motivated the adoption of Rule 10b5–1.

In choosing an appropriate cooling-off period for officers and directors, we are mindful of some commenters' concerns that a cooling-off period might reduce the appeal of Rule 10b5–1 plans, which could have undesirable effects on investor confidence.[114] We expect, however, that the period we are adopting will not have a significant impact on directors' and officers' desire to satisfy the requirements of the affirmative defense. Directors and officers have strong incentives to rely on a Rule 10b5–1 plan, due to the potential effects of the affirmative defense on the likelihood and outcome of any litigation. In addition, many issuers maintain trading windows that may restrict the trading activity of corporate insiders during an issuer's ''closed window'' period except through the use of a Rule 10b5–1 plan, and such periods may cover significant portions of the year. Similarly, Section 306 of the Sarbanes-Oxley Act,[115] and our implementing regulations,[116] prohibit most trades during issuer pension blackout periods other than through the use of a plan that satisfies the affirmative defense conditions of Rule 10b5–1(c).[117] Accordingly, for these reasons, we have selected a cooling-off period for officers and directors that we conclude strikes the proper balance in deterring insider trading without unduly discouraging the adoption of Rule 10b5–1 plans.

We are not imposing the same cooling-off period required for directors and officers to other persons, as some commenters suggested,[118] Instead, we are requiring a cooling-off period of 30 days for persons other than directors, officers or the issuer. We generally agree that persons other than directors and officers often have access to material nonpublic information. At the same time, we recognize that each of the proposed requirements of the affirmative defense may impose costs on such persons, whose needs for diversification and liquidity may differ from those of officers and directors, as some commenters noted.[119] In particular, we recognize that some persons will experience meaningful delays in their ability to liquidate a stock position, which may cause some financial strain particularly for employees who may lack the resources and access to alternative liquidity sources available to directors and officers. Therefore, we disagree with commenters who urged us to impose the same cooling-off period required for directors and officers to all other traders.

The 30-day cooling-off period we are adopting for persons other than directors, officers, or the issuer reflects a balancing of the considerations we have outlined above. We believe that when any insider enters into a Rule 10b5–1 plan, a period of time should elapse before trading under the plan can commence to help ensure that a trade is not on the basis of material nonpublic information. At the same time, we recognize the heightened burdens a cooling-off period may impose on insiders who are not directors or officers, and who may have more limited financial resources. In light of these considerations, we have adopted a shorter cooling-off period for persons other than officers and directors that is still long enough to reduce the potential for some opportunistic trades.[120]

We are not implementing commenters' suggestions to adopt a financial hardship exception from the cooling-off period due to the practical difficulties of administering this type of exception.[121] Assessing financial hardship would require careful scrutiny and balancing of each insider's assets, liabilities, and obligations, and this fact-intensive inquiry would undermine the predictability that the affirmative defense is intended to provide.

In addition, we agree with commenters that only certain types of modifications of an existing Rule 10b5–1 plan should trigger a new cooling-off period. We therefore are adopting a new paragraph to Rule 10b5–1(c)(1) that specifically provides that a modification or change to the amount, price, or timing of the purchase or sale of the securities (or a modification or change to a written formula or algorithm, or computer program that affects the amount, price, or timing of the purchase or sale of the securities) underlying a contract, instruction, or written plan as described in Rule 10b5–1(c)(1)(i)(A) is a termination of such contract, instruction, or written plan, and the adoption of a new contract, instruction, or written plan, and such new adoption will trigger a new cooling-off period. The final amendment codifies prior Commission guidance on existing Rule 10b5–1(c)(1)(i)(C) about the effect of modifications.[122] Under the final amendment, modifications that do not change the sales or purchase prices or price ranges, the amount of securities to be sold or purchased, or the timing of transactions under a Rule 10b5–1 plan (such as an adjustment for stock splits or a change in account information) will not trigger a new cooling-off period. We disagree with the commenter that urged us to not trigger a new cooling-off period upon a modification, because a corporate insider could easily change the key terms of an existing plan at a time when they are aware of material nonpublic information, such as by increasing the sales price to take advantage of favorable news, allowing the insider to profit from such information.[123]

Finally, we are not adopting a cooling-off period for the issuer at this time. In light of the comments we received on this aspect of the proposed rules, we believe that further consideration of potential application of a cooling-off period to the issuer is

[113] *See supra* note 65.

[114] *See, e.g.,* letters from Chamber of Commerce 2, NAM and SIFMA.

[115] 15 U.S.C. 7244.

[116] *See* 17 CFR 245.100 *et seq.*

[117] *See* 17 CFR 245.101(c)(2). Our rules also provide trades made pursuant to a Rule 10b5–1 plan more flexibility with respect to when an insider must report the trade on Form 4. *See* 17 CFR 240.16a–3(g)(2); 17 CFR 240.16a–3(g)(4).

[118] *See* letters from Better Markets, NASAA, and Senator Warren et al.

[119] *See* letters from Chamber of Commerce 2 and NAM.

[120] We recognize that we have previously observed that the affirmative defense would be available to an employee who acquires company stock through an employee stock purchase plan or a Section 401(k) plan. *See* 2000 Adopting Release, *supra* note8, at 51728. We do not believe that a 30-day cooling-off period will significantly affect non-officer employees' use of such plans, as we think that employees employ these plans primarily to make relatively regular purchases over long periods of time, such that a waiting period of two biweekly pay periods before planned trades can begin will not appreciably affect the employees' preferences.

[121] *See supra* note 69.

[122] *See* 2000 Adopting Release, *supra* note 8, at 51718 n 111.

[123] *See* letter from NAM.

warranted.[124] Although we are aware that many issuers currently use cooling-off periods in connection with their securities transactions and that such cooling-off periods may significantly mitigate the risk of investor harm, we are also mindful that the use and length of such cooling off periods is not uniform and that the misuse of material nonpublic information by issuers when trading in their own securities can result in significant investor harm because transactions by issuers often involve substantial quantities of securities. We are continuing to consider whether regulatory action is needed to mitigate any risk of investor harm from the misuse of Rule 10b5–1 plans by the issuer, such as in the share repurchase context. We note that, in general, a corporation is considered an insider with regard to its duty to either disclose or abstain when purchasing its own shares on the basis of material, nonpublic information.[125]

2. Director and Officer Certifications

a. Proposed Amendments

The Commission proposed to amend Rule 10b5–1(c)(1)(ii) to impose a certification requirement as a condition to the affirmative defense. Under the proposed amendment, if a director or officer (as defined in Rule 16a–1(f)) of the issuer of the securities adopts a new written Rule 10b5–1 plan, such director or officer would be required, as a condition to the affirmative defense, to promptly furnish to the issuer a separate written certification, certifying that at the time of the adoption of the plan:

- They are not aware of material nonpublic information about the issuer or its securities; and
- They are adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of Exchange Act Section 10(b) and Exchange Act Rule 10b–5.

In doing so, the Commission indicated that the use of the term ''officer'' as defined in Rule 16a–1(f) is appropriate for the reasons discussed above with respect to the cooling-off period (*i.e.,* these individuals are more likely to be aware of material nonpublic information regarding the issuer and its securities, as well as more likely to be involved in making or overseeing corporate decisions about whether and when to disclose information).

The Commission intended the proposed certification requirement to reinforce directors' and officers' cognizance of their obligation not to trade or adopt a trading plan while aware of material nonpublic information, their responsibility to determine whether they are aware of material non-public information when adopting Rule 10b5–1 plans, and the fact that the affirmative defense under Rule 10b5–1 requires them to act in good faith and not to adopt such plans as part of a plan or scheme to evade the insider trading laws. The Commission noted in the Proposing Release that the proposed certification involves important considerations, especially because directors and officers are often aware of material nonpublic information.

In addition, the Commission clarified that, subject to their confidentiality obligations, directors and officers can consult with experts to determine whether they can make this representation truthfully. Legal counsel can assist directors and officers in understanding the meaning of the terms ''material'' and ''nonpublic information.'' [126] The Commission stated, however, that the issue of whether a director or officer has material nonpublic information is an inherently fact-specific analysis. Thus, a director's or officer's completion of the proposed certification would reflect their personal determination that they do not have material nonpublic information at the time of adoption of a Rule 10b5–1 plan.

The proposed amendment also included an instruction that a director or officer seeking to rely on the affirmative defense should retain a copy of the certification for a period of ten years. The proposed amendments would not require a director, officer, or the issuer to file the certification with the Commission, and the proposed certification would not be an independent basis of liability for directors or officers under Section 10(b) and Rule 10b–5. Rather, the Commission intended the proposed certification to underscore the certifiers' awareness of their legal obligations under the Federal securities law related to trading in the issuer's securities.[127]

b. Comments on the Proposed Amendments

Commenters were divided on the certification requirement. Several commenters generally supported the proposed certification requirement for directors and officers.[128] Some of these commenters agreed that the proposed certification could reinforce directors' or officers' awareness of their legal obligations under the Federal securities law.[129] Another commenter noted that the certification should increase investor confidence.[130]

[124] *See supra* note 71 and accompanying text.

[125] *See, e.g., McCormick* v. *Fund Am. Cos.,* 26 F.3d 896 (9th Cir. 1994) (''Numerous authorities have held or otherwise stated that the corporate issuer in possession of material nonpublic information must, like other insiders in the same situation, disclose that information to its shareholders or refrain from trading with them.'') (citations omitted); *Shaw* v. *Digital Equip. Corp.,* 82 F.3d 1194, 1203–04 (1st Cir. 1996) (''Courts . . . have treated a corporation trading in its own securities as an 'insider' for purposes of the 'disclose or abstain' rule.'') (citations omitted); *Rogen* v. *Ilikon Corp.,* 361 F.2d 260, 266–68 (1st Cir. 1966); *Levinson* v. *Basic Inc.,* 786 F.2d 741, 746 (6th Cir. 1986), *vacated on other grounds,* 485 U.S. 224, 108 S. Ct. 978 (1988) (''[c]ourts have held that a duty to disclose [merger] negotiations arises in situations, such as where the corporation is trading in its own stock''); *Kohler* v. *Kohler Co.,* 319 F.2d 634, 638 (7th Cir. 1963) (the ''underlying principles'' regarding trading on inside information ''apply not only to majority stockholders of corporations and corporate insiders, but equally to corporations themselves''). Other rules promulgated pursuant to Section 10(b) demonstrate that issuers trading in their own stock have a duty to disclose or abstain. For example, Exchange Act Rule 10b–18 provides an issuer with a '''safe harbor' from liability'' under Rule 10b–5 under certain circumstances when the issuer is repurchasing its own stock. [17 CFR 240.10b–18]. But, as the Commission has explained, Rule 10b–18 ''confers *no* immunity from possible Rule 10b–5 liability where the issuer engages in repurchases while in possession of favorable, material non-public information concerning its securities.'' *Purchases of Certain Equity Securities by the Issuer and Others,* Release No. 33–6434, 1982 WL 33916 at *2, *16 n.5 (Nov. 17, 1982).

[126] As the Commission has stated previously, we rely on existing definitions of the terms ''material'' and ''nonpublic'' established in case law. Information is material if ''there is a substantial likelihood'' that its disclosure ''would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'' *See Basic* v. *Levinson,* 485 U.S. 224, 231 (1988) (quoting and applying *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976) to the Section 10(b) and Rule 10b–5 context); Rule 405 [17 CFR 230.405] of the Securities Act of 1933 (the ''Securities Act'') [15 U.S.C. 77a *et seq.*]; Exchange Act Rule 12b–2 [17 CFR 240.12b–2]. Information is nonpublic until the information is broadly disseminated in a manner sufficient to ensure its availability to the investing public generally, without favoring any special person or group. *See Dirks* v. *SEC,* 463 U.S. 646, 653–54 & n.12 (1983); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 854 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969); Regulation FD [17 CFR 243.101(e)]. For purposes of insider trading law, insiders must wait a ''reasonable'' time after disclosure before trading. What constitutes a reasonable time depends on the circumstances of the dissemination. *In re Faberge, Inc.,* 45 SEC. 249, 255 (1973) (*citing Texas Gulf Sulphur,* 401 F.2d at 854). Under the misappropriation doctrine, a recipient of inside information must make a ''full disclosure'' to the sources of the information that they plan to trade on or tip the information within a reasonable time before doing so. *O'Hagan,* 521 U.S. at 655, 659 n.9; *see also SEC* v. *Rocklage,* 470 F.3d 1, 11–12 (1st Cir. 2006).

[127] *See, e.g., O'Hagan,* 521, U.S. at 651–52; *Chiarella,* 445 U.S. at 227; *Steginsky* v. *Xcelera Inc.,* 741 F.3d 365, 370 n.5 (2d Cir. 2014).

[128] *See, e.g.,* letters from CII, CO PERA, ICGN, NYSE, and O'Reilly.

[129] *See* letters from CII and O'Reilly.

[130] *See* letter from ICGN.

A number of commenters, however, did not support the proposed certification requirement.[131] Many of these commenters contended that the certification was unnecessary because broker-dealers who execute Rule 10b5–1 plans usually require the director or officer to make similar representations.[132] Several commenters stated that any final rules should clearly provide that the certification does not establish an independent basis of liability for directors or officers under Section 10(b) and Rule 10b–5.[133] Another commenter expressed concern that the language included in the proposed certification indicating that the director or officer is ''not aware of material nonpublic information about the issuer or its securities'' at the time of adoption of a Rule 10b5–1 plan is inconsistent with Rule 10b–5 and insider trading jurisprudence.[134] This commenter asserted that, for trading activity to be unlawful under Exchange Act Section 10(b)(5), the person trading must not have been aware of material nonpublic information at the time that they made the purchase or sale. This commenter claimed that the affirmative defense should be available if either: (1) the person trading was not aware of any material nonpublic information about the issuer or the security when they entered into the Rule 10b5–1 trading arrangement; or (2) any such material nonpublic information is either public or no longer material at the time of the trade.

Several commenters suggested alternatives to requiring a separate certification. A few commenters suggested that the proposed amendment should provide that the certification should instead be included in the documentation for the Rule 10b5–1 plan.[135] Another commenter recommended that the Commission rely on the representations that traders make to the broker executing the Rule 10b5–1 plan.[136]

c. Final Amendment

We are adopting Rule 10b5–1(c)(1)(ii)(C) largely as proposed, but with certain modifications. Under the final rule, if a director or ''officer'' (as defined in Rule 16a–1(f)) of the issuer of the securities adopts a Rule 10b5–1 plan, as a condition to the availability of the affirmative defense, such director or officer will be required to include a representation in the plan certifying that at the time of the adoption of a new or modified Rule 10b5–1 plan: (1) they are not aware of material nonpublic information about the issuer or its securities; and (2) they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b–5.[137]

Since its adoption, Rule 10b5–1(c)(1) has required, as a condition of the affirmative defense, that a person ''demonstrate[]'' that they adopted their trading plan before becoming aware of material nonpublic information. The rule has also provided that the affirmative defense only applies when the trading arrangement was entered into in good faith. As discussed above, we are concerned that, notwithstanding these requirements, corporate insiders may be using Rule 10b5–1 plans in ways that are not consistent with the affirmative defense and that harm investors and undermine the integrity of the securities markets.[138]

The certification condition is intended to reinforce directors' and officers' cognizance of their obligation not to trade or enter into a trading plan while aware of material nonpublic information about the issuer or its securities, that it is their responsibility to determine whether they are aware of material non-public information when adopting Rule 10b5–1 plans, and that the affirmative defense under Rule 10b5–1 requires them to act in good faith and not to adopt such plans as part of a plan or scheme to evade the insider trading laws. As noted in the Proposing Release, we recognize that this certification involves important considerations, especially because directors and officers are often aware of material nonpublic information. Subject to their confidentiality obligations, directors and officers can consult with experts to determine whether they can make this representation truthfully. Legal counsel can assist directors and officers in understanding the meaning of the terms ''material'' and ''nonpublic information.'' [139] However, the issue of whether a director or officer has material nonpublic information is an inherently fact-specific analysis. Thus, a director or officer's completion of the proposed certification would reflect their personal determination that they do not have material nonpublic information at the time of adoption of a Rule 10b5–1 plan.

As suggested by some commenters,[140] however, we have modified the final amendment to require that the certification be included in the Rule 10b5–1 plan as representations, rather than prepared as a separate document to be presented to the issuer. Consistent with the intent behind the proposal, this approach will reinforce directors' and officers' cognizance of their obligations discussed above, but will eliminate any additional burden that separate documentation may create.

We are not persuaded, however, that any representations that corporate insiders may already make to broker-dealers obviate the need for a certification. While we note that broker-dealers may require similar representations from directors and officers before executing a Rule 10b5–1 plan, given that there is no requirement that they do so, such practices may not be universal, and the requirement may differ among the various broker-dealers that do require such representations. This rule therefore will better ensure that corporate insiders provide these representations. Further, because issuers must provide disclosure regarding the material terms (other than price) of their directors' and officers' Rule 10b5–1 plans under new Item 408(a) of Regulation S–K as described below, any representation made as part of such plans will also likely be requested by and made available to the issuer to facilitate its compliance with the disclosure requirement. To the extent that directors and officers provide issuers with these representations, they would likely have a greater effect on investor confidence that the officer or director in fact was not aware of material nonpublic information when making the representation due to the issuer's close relationship to its officers and directors.

In addition, we are not adopting the proposed instruction that a director or

[131] *See, e.g.,* letters from ACCO, Cravath, Davis Polk, DLA, Kirkland, MD Bar, NAM, Quinn, SGC, Shearman, Sullivan, and Wilson Sonsini.

[132] *See, e.g.,* letters from ACCO, Cravath, DLA, Kirkland, Shearman, and Sullivan.

[133] *See, e.g.,* letters from Cravath, DLA, Kirkland, Shearman, and Sullivan.

[134] *See* letter from MD Bar.

[135] *See, e.g.,* letters from Cravath and SIFMA 3.

[136] *See* letter from ACCO.

[137] The rule will not require these personal certifications where a director or officer terminates an existing Rule 10b5–1 plan and does not adopt a new/modified trading arrangement for which the affirmative defense is sought. However, new Item 408 of Regulation S–K will require registrants to disclose whether any director or officer has terminated a Rule 10b5–1 plan or non-Rule 10b5–1 trading arrangement. *See infra* Section II.B.1. An issuer's insider trading policies and procedures may otherwise govern such plan terminations. *See infra* at Section II.B.2. Finally, whether an inference can be drawn that an individual unlawfully traded on the basis of inside information may be informed by the manner in which they trade (*see, e.g., SEC* v. *Warde,* 151 F.3d, 42, 47 (2d Cir.1998), including where termination of a Rule 10b5–1 trading arrangement is soon followed by non-Rule 10b5–1 trades in the same security or issuer.

[138] *See supra* Section II.A.

[139] *See supra* note 126.

[140] *See, e.g.,* letters from Cravath and SIFMA 3.

officer seeking to rely on the affirmative defense should retain a copy of the certification for a period of ten years. The burden of establishing that the requirements of the affirmative defense have been met will fall on the corporate insider who wishes to rely on it. As a result, we find that the proposed instruction is unnecessary as directors and officers already have reason to keep accurate records, including the representations, to establish that they have satisfied the conditions of the affirmative defense.

Finally, we disagree with the commenter who argued that requiring directors or officers to certify that they lack material nonpublic information at the time of adopting a Rule 10b5–1 plan would be inconsistent with insider trading jurisprudence.[141] Specifically, the commenter argued that the certification should instead allow a trader to certify that any material nonpublic information the trader holds at the time the plan is entered into will be either public or no longer material at the time of the trade.[142] We concur with this commenter that, in general, liability under Rule 10b–5 and Section 10(b) requires a showing that a covered individual was aware of material nonpublic information at the time that a trade was executed. Rule 10b5–1, however, is intended to provide an affirmative defense against liability under circumstances where it is relatively unlikely that a trader will be able to trade on material nonpublic information. As noted earlier, this defense is designed to cover situations where a person can demonstrate that a trade was not based on material nonpublic information. Requiring a representation that a director or officer was not aware of material nonpublic information when adopting a Rule 10b5–1 plan as a condition of the affirmative defense better ensures that the defense is available only in those circumstances. Moreover, by its nature, an affirmative defense does not affect the substance of the underlying prohibition. Individuals who cannot satisfy this condition because they are aware of material nonpublic information at the time that they enter into a Rule 10b5–1 plan may still be able to trade without liability if they lack material nonpublic information at the time that their trade is actually executed. In such circumstances, however, they would not be able to benefit from the affirmative defense provided by Rule 10b5–1(c)(1). We also disagree with the commenter's suggestion that the representation condition we are adopting is a substantive change in what knowledge an individual may possess when adopting a plan that satisfies the conditions of Rule 10b5–1(c)(1).[143] The representation condition rather adds a requirement about how that knowledge is documented for purposes of the affirmative defense.

Finally, the Commission also proposed a technical change to incorporate the Preliminary Note to Rule 10b5–1 into Rule 10b5–1(b).[144] The Preliminary Note to Rule 10b5–1 states that the rule defines when a purchase or sale constitutes trading ''on the basis of'' material nonpublic information in insider trading cases brought under Section 10(b) of the Exchange Act and Rule 10b–5 thereunder, that the law of insider trading is otherwise defined by judicial opinions construing Rule 10b–5, and that Rule 10b5–1 does not modify the scope of insider trading law in any other respect.[145] We are adopting this change as proposed.

The existing law of insider trading provides an established legal framework that makes directors and officers liable if they fraudulently purchase or sell securities on the basis of material nonpublic information in breach of a duty of trust or confidence. Rule 10b5–1 provides that a purchase or sale of a security of an issuer is on the basis of material nonpublic information for purposes of Section 10(b) and Rule 10b–5 if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale. Rule 10b5–1 expressly ''does not modify the scope of insider trading law in any other respect.'' We think it is sufficiently clear that the certification would not create an independent basis of liability for insider trading and do not believe it is necessary to amend the rule in this regard, as suggested by several commenters.[146]

3. Restricting Multiple Overlapping Rule 10b5–1 Trading Arrangements and Single-Trade Arrangements

a. Proposed Amendments

Currently, a person is not entitled to the Rule 10b5–1(c)(1) affirmative defense for a trade if they enter into or alter a ''corresponding or hedging transaction or position'' with respect to the planned transactions.[147] In proposing this requirement, the Commission explained that it was

[141] *See* letter from MD Bar.

[142] The Commission is not adopting this alternative because of the difficulties a trader would face in assessing at the time of certification whether the information will become nonpublic or no longer material at the time of their future trading. For example, a trader may not be able to make a determination about whether and when other persons will disclose nonpublic information on behalf of an issuer by a certain time in the future. *See* 2000 Adopting Release, *supra* note 8 above (noting that public companies frequently ''designat[e] a limited number of persons who are authorized to make disclosures'' that can be considered as made ''on behalf of an issuer'' to comply with the securities laws); *see also* 17 CFR 243.100, 101(c). The certification condition that the Commission is adopting permits traders to make the relatively more straightforward determination whether they are aware of material nonpublic information at a given point in time.

[143] The 2000 adopting release made clear that a person could adopt a plan ''while the person was not aware of *any* inside information.'' 2000 Adopting Release at 51737 (emphasis added); *accord Selective Disclosure and Insider Trading,* Release No. 33–7787 (Dec. 20, 1999) [64 FR 72590 (Dec. 28, 1999)] at 72601 (''If the insider provides the instructions without awareness of *any* material nonpublic information, the Rule would permit him or her to complete the previously instructed sales plan even if he or she later became aware of inside information.'') (emphasis added).

[144] *See* Proposing Release at 8689.

[145] *See* 2000 Adopting Release *supra* note 8 at 51727. The Commission adopted an ''awareness'' standard in 2000 that provides that a purchase or sale of a security of an issuer is on the basis of material nonpublic information about that security or issuer ''if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.'' 17 CFR 240.10b5–1(b) (2000). The Commission explained at that time that one view was that a trader may be liable for trading while in ''knowing possession of information,'' while a contrary view was that a trader is not liable unless it is shown that the trader ''used'' the information for trading. *Selective Disclosure and Insider Trading,* 65 FR 51716–01, 51726–27 (Aug. 24, 2000). The Commission ultimately adopted the ''awareness'' standard that balanced considerations of both views while being ''closer'' to the ''knowing possession'' standard than to the ''use'' standard. *Id.* One commenter suggested that the Commission lacked authority ''in the year 2000'' to adopt Rule 10b5–1(b)'s awareness standard. *See* letter from Pacific Legal Foundation. However, none of the modifications the Commission is adopting in this Release would alter the ''awareness'' standard that the Commission adopted in 2000. *See supra* at p.8 n. 9. In any event, by prohibiting any manipulative or deceptive device or contrivance ''in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or the protection of investors'' (Exchange Act Section 10(b)), Congress thereby authorized the Commission to ''prescribe legislative rules'' like Rule 10b5–1, and courts must accord Rule 10b5–1 ''controlling weight.'' *O'Hagan,* 521 U.S. at 673 (quoting *Chevron,* 467 U.S. at 844). Since its adoption in 2000, courts have appropriately deferred to the Commission's ''awareness'' standard, holding that the Commission's determination is ''entitled to deference.'' *Royer,* 549 F.3d at 899 (applying *Chevron*); *see also United States* v. *Rajaratnam,* 719 F.3d 139, 157–61 (2d Cir. 2013), *cert. denied,* 134 S. Ct. 2820 (2014). Furthermore, Congress has expressly authorized the Commission to seek and district courts to impose civil monetary penalties where a person has violated the securities laws by purchasing or selling a security ''while in possession of'' material nonpublic information. Exchange Act Section 21A(a)(1) [15 U.S.C. 78u–1(a)(1)]; *see also* Exchange Act Section 20(d) (liability for trading ''while in possession of'' material nonpublic information) [15 U.S.C. 78t(d)].

[146] *See, e.g.,* letters from Cravath, DLA, Kirkland, Shearman, and Sullivan.

[147] *See* Rule 10b5–1(c)(1).

designed to prevent persons from devising schemes to exploit material nonpublic information by setting up pre-existing hedged trading programs, and then canceling execution of the unfavorable side of the hedge, while permitting execution of the favorable transaction.[148]

In the Proposing Release, the Commission recognized that multiple overlapping plans can be used for these hedging purposes and in other ways that might allow material nonpublic information to ''factor into the trading decision'' of an insider who had complied with the other provisions of Rule 10b5–1. In particular, currently, a person can adopt and employ multiple overlapping Rule 10b5–1 trading arrangements and exploit material nonpublic information by setting up trades timed to occur around dates on which they expect that the issuer will likely release material nonpublic information (such as earnings releases) and then selectively cancel trades or terminate plans on the basis of material nonpublic information before the information is publicly disclosed. In this same vein, the Commission noted its concern that a person could circumvent the proposed cooling-off period by setting up multiple overlapping Rule 10b5–1 trading arrangements, and deciding later which trades to execute and which to cancel after they become aware of material nonpublic information, but before its release.

To address these concerns, the Commission proposed to amend Rule 10b5–1(c)(1) to provide as a condition of the affirmative defense that the person who has entered the plan has no outstanding (and does not subsequently enter into another) Rule 10b5–1 plan for open market purchases or sales of the same class of securities. The Commission also requested comment on whether it was appropriate to exclude multiple trading arrangements for open market purchases or sales of the same class of securities, and specifically asked commenters to weigh in on whether allowing a concurrent trading arrangement for each class of securities would ''create incentives for corporate insiders to own different classes of stock.'' [149]

This proposed limitation was designed to eliminate the ability of traders to use multiple plans to strategically execute trades based on material nonpublic information and still claim the protection of the affirmative defense for such trades.

The proposed amendment would not apply to transactions where a person acquires (or sells) securities through participation in employee stock ownership plans (''ESOPs'') or dividend reinvestment plans (''DRIPs''), which are not executed by the person on the open market. Participation in these programs is sometimes effected through Rule 10b5–1 plans, and because these transactions are directly with the issuer, the Commission concluded they were less likely to give rise to insider trading concerns.[150] Thus, the Commission proposed this exception to preserve the benefits of flexibility for plan participants with respect to such plans.

In addition to restricting the use of multiple overlapping trading arrangements, the Commission proposed to amend Rule 10b5–1(c)(1)(ii) to limit the availability of the affirmative defense for a trading arrangement designed to cover a single trade, by providing that the affirmative defense would only be available for one single-trade plan during any 12-month period. Under the proposed amendment, the affirmative defense would not be available for a single-trade plan if the trader had purchased or sold securities pursuant to another single-trade plan within the preceding 12-month period. In proposing this amendment, the Commission noted that some recent research indicated that single-trade plans are consistently loss-avoiding and their adoption often precedes stock price declines.[151] At the same time, the Commission recognized the use of single–trade plans to address one-time liquidity needs. The proposed limitation on single-trade plans was intended to balance accommodating the use of single-trade plans for one-time liquidity needs against the potential for abuse of such plans.

b. Comments on the Proposed Amendments

Several commenters generally supported both the proposed restriction on multiple overlapping trading arrangements, and the limitation on single-trade plans.[152] One commenter expressed support for the prohibition on multiple overlapping trading arrangements, but did not address single-trade plans.[153] A few commenters supported the proposed prohibition on multiple overlapping trading arrangements but asked the Commission to limit the prohibition to directors and officers, noting that individuals have many legitimate reasons to have overlapping plans, such as gifts and estate-planning transactions, and that directors and officers are the group most likely to have material nonpublic information.[154]

With respect to single-trade plans specifically, commenters had mixed responses. One commenter expressed support for the limitation on single-trade plans,[155] while another commenter recommended that the Commission eliminate the availability of the Rule 10b5–1 affirmative defense for all single-trade plans.[156] On the other hand, some commenters noted that single-trade plans often have legitimate uses.[157] For example, one commenter maintained that, if adopted, the Commission should provide exceptions for derivative transactions, gifts, estate-planning transactions, and employee benefit plan transactions.[158] Other commenters indicated that the proposed restriction could be evaded by splitting one trade that would be authorized under such a plan into two trades.[159]

In addition, several commenters expressed concern that the proposed restrictions on multiple overlapping and single-trade Rule 10b5–1 plans would negatively impact certain employee compensation plan transactions that are structured as Rule 10b5–1 plans, such as sales of securities used to generate funds to cover the withholding taxes associated with equity vesting and elections under 401(k) plans or employee stock purchase plans that may be structured as Rule 10b5–1 plans (''sell-to-cover transactions'').[160] Some of these commenters asserted that these transactions do not implicate the concerns that the proposed amendment is intended to address because a

[148] *See Selective Disclosure and Insider Trading,* Release No. 33–7787 (Dec. 20, 1999) [64 FR 72590 (Dec. 28, 1999)].

[149] Proposing Release, *supra* note 23, at 8692 (request for comment number 13).

[150] However, the Supreme Court has explained that lower courts ''should consider the extent to which an ERISa-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws.'' *Fifth Third Bancorp* v. *Dudenhoeffer,* 573 U.S. 409, 429 (2014). Officers and directors also need to follow Regulation Blackout Trading Restrictions, *see* 17 CFR 245.100 through 245.104.

[151] *See* Gaming the System, *supra* note 20; *see also infra* Section V.B.

[152] *See, e.g.,* letters from AFL–CIO, Better Markets, CO PERA, MD Bar, NYCC, NASAA, and Public Citizen.

[153] *See* letter from Kirkland.

[154] *See, e.g.,* letters from SIFMA 3 and Sullivan.

[155] *See* letter from NYSE.

[156] *See* letter from Sen. Warren et al.

[157] *See, e.g.,* letters from Monday.com Ltd (''Monday.com''), BioNJ, SCG, SIFMA 3, Davis Polk, Fenwick, Jones Day, Shearman, and Wilson Sonsini

[158] *See* letter from Sullivan.

[159] *See* letter from Cravath and Davis Polk.

[160] *See, e.g.,* letters from Fenwick, HP, Monday.com, SCG, Sullivan, and Wilson Sonsini.

corporate insider has limited discretion as to the timing or the number of shares sold to cover the tax liability.[161] Other commenters generally stated that under the proposed limitations, insiders could not maintain both a traditional Rule 10b5–1 plan and a plan designed to execute sell-to-cover transactions.[162]

With respect to the aspect of the proposed definition of ''multiple concurrent trading arrangements'' under which an insider could establish a separate arrangement for each ''class of securities,'' several commenters generally supported the limitation on multiple overlapping plans as proposed.[163] One commenter, however, argued that the proposed definition would encourage insiders to establish parallel trading arrangements for common stock, preferred stock, and options.[164] Because the values of these instruments are all highly correlated, the commenter stated, the proposed rule would still allow insiders to opportunistically use material nonpublic information by establishing such parallel arrangements and then cancelling one or more of them.

Many commenters did not support the proposed restriction on multiple overlapping Rule 10b5–1 plans.[165] Some commenters asserted that this limitation was unnecessary, because, given that the affirmative defense already does not permit adoption of hedged plans in which a person takes offsetting financial positions, there is no additional abusive conduct to address.[166]

As with single-trade plans, a number of commenters indicated that there are legitimate, common uses of multiple, overlapping Rule 10b5–1 plans.[167] Some commenters noted, for example, that issuers often use multiple concurrent Rule 10b5–1 plans with different brokers to execute share repurchase transactions.[168] Other commenters indicated that directors and officers often employ multiple Rule 10b5–1 plans because they hold shares in different accounts with multiple financial institutions.[169] They noted, for example, that a corporate insider may hold shares received upon the exercise of stock options in an account with the financial institution that is the administrator of the issuer's incentive equity plan, and hold shares acquired through open market transactions or other means in a separate account with a different financial institution.

A number of commenters expressed concern that the wording of the proposed amendment regarding multiple overlapping plans was overly broad as it could encompass every open market transaction, including transactions that are not executed under a Rule 10b5–1 plan.[170] Several commenters urged the Commission to clarify that this provision would not prohibit the adoption of a new Rule 10b5–1 plan while an existing plan is in effect as long as no trades could commence under the new plan until the existing plan has expired.[171]

Finally, several commenters contended that the proposed cooling-off period for Rule 10b5–1 plans was a more effective method to address the concerns over potential abusive uses of multiple overlapping and single-trade Rule 10b5–1 plans.[172]

c. Final Amendments

After considering the comments, we are adopting the proposed amendment addressing multiple overlapping Rule 10b5–1 plans with certain modifications. With respect to multiple overlapping Rule 10b5–1 contracts, instructions or plans, the final amendment will add a condition to the Rule 10b5–1(c)(1) affirmative defense that persons, other than issuers, may not have another outstanding (and may not subsequently enter into any additional) contract, instruction or plan that would qualify for the affirmative defense under the amended Rule 10b5–1 for purchases or sales of any class of securities of the issuer on the open market during the same period. We disagree with commenters who urged us to limit these provisions only to directors and officers.[173] While it is true, as commenters note and as we observed in the Proposing Release, that officers and directors are most likely to have access to material nonpublic information,[174] other traders may at times also have such access. Trading by these other persons can impact investors and investor confidence in much the same ways as trading by officers and directors. For example, we think it could undermine investor confidence to learn that insiders who are not Section 16 officers were able to opportunistically manipulate their trading after receiving material nonpublic information, so that the insider could profit at the expense of uninformed investors. As we explain below, we think that any financial impact on insiders other than officers and directors resulting from these limitations will be more limited than in the case of the cooling-off period.

Accordingly, we disagree with those commenters who suggested that trades by individuals other than officers and directors would not affect the integrity of securities markets.[175] While other traders may not necessarily control corporate trading or disclosure decisions, they still may stand to profit substantially from trading on any material nonpublic information to which they have access. Further, because Form 4 may reveal potentially opportunistic trades to the public, we think the fact that most persons, other than Section 16 officers, do not file Form 4 is a reason for more safeguards with respect to their trading, not fewer.

In reaching our determination, we are mindful that some traders, such as rank-and-file employees, may have liquidity and diversification needs that are greater than those of more highly compensated officers, as commenters noted.[176] In recognition of these needs, we are adopting a modification to the proposed limitations, described in more detail below, under which traders may employ multiple plans to satisfy certain tax obligations incident to equity compensation. For insiders who are already trading under an existing plan when such liquidity needs arise, meeting those needs will typically require the insider to modify the existing plan, as our limitation on multiple plans will prevent the insider from adopting an additional plan to cover the newly planned transactions. This modification will in turn likely require the insider to pause trading under the preexisting plan for the duration of the insider's cooling-off

[161] *See, e.g.,* letters from BioNJ, Monday.com, and Simpson Thatcher.

[162] *See, e.g.,* Sullivan and Wilson Sonsini.

[163] *See* letters from Better Markets, CII, and CO PERA.

[164] *See* letter from NASAA.

[165] *See, e.g.,* letters from ABA, ACCO, BioNJ, Chamber of Commerce 2, Chevron, Coalition Letter, Cravath, Davis Polk, DLA, Dow, FedEx, Fenwick, HP, HRPA, HudsonWest, Jones Day, K&L Gates, Kirkland, Manulife, Monday.com, NAM, NVCA, NYC Bar, Paul Weiss, PNC, Quest, Quinn, SCG, Shearman, Simpson, and Wilson Sonsini.

[166] *See, e.g.,* letters from Davis Polk and Shearman.

[167] *See, e.g.,* letters from Chamber of Commerce 2, Cravath, Davis Polk, Dow, FedEx, HP, Jones Day, Manulife, Monday.com, NVCA, NYC Bar, Quest, Shearman, Sullivan, and Wilson Sonsini.

[168] *See, e.g.,* letters from Cravath, Davis Polk, Dow, FedEx, Quest, Shearman, and Sullivan.

[169] *See, e.g.,* letters from Quest, and Wilson Sonsini.

[170] *See, e.g.,* letters from Dow, SCG, ABA, Cleary, Paul Weiss, Shearman, Sullivan, and Wilson Sonsini.

[171] *See, e.g.,* letters from Jones Day, Kirkland, Paul Weiss, Simpson, Shearman, and Wilson Sonsini.

[172] *See, e.g.,* letters from Manulife, Cravath, NAM, and Cleary.

[173] *See* letters from Sullivan and SIFMA 3.

[174] *See* Proposing Release at 23; letters from CII, Cravath, and SIFMA.

[175] *See* letters from Cravath and Davis Polk.

[176] *See* letters from Chamber of Commerce 2 and NAM.

period. Because the cooling-off period for insiders other than officers and directors is 30 days, however, we believe that any resulting impact on the insider should be limited. While we agree that it is possible this cost, or other barriers, may reduce the appeal of requiring non-officers to make use of a Rule 10b5–1 plan, as one commenter noted, [177] we think on balance that it is better to ensure that any Rule 10b5–1 plans that are adopted in fact impose meaningful limits on opportunistic trading. More widespread adoption of Rule 10b5–1 plans is unlikely to be helpful to investors or markets if such plans do not constrain many opportunistic trades.

We are modifying the original proposal by removing the reference to ''same class of securities,'' so that the multiple overlapping plans restriction will apply to contracts, instructions or plans for any class of securities of the issuer. We agree with the commenter who argued that, given the strong likelihood that the values of different classes of securities of a given issuer are highly correlated, allowing the use of multiple plans for trading in the securities of one issuer would allow for significant possibility of opportunistic behavior.[178] As a result, persons (other than the issuer) may only have one such contract, instruction or plan, rather than one contract, instruction or plan for each class of securities.

This condition is intended to address the concerns discussed above about an insider's use of multiple overlapping plans in ways that could allow material nonpublic information to factor into the trading decision. Because these concerns are not limited to hedged plans where a trader takes offsetting financial positions, we disagree with those commenters who asserted that the existing hedging restriction of the Rule 10b5–1 affirmative defense renders this limitation unnecessary. With a sufficient number of different plans, an insider could achieve a desired trading outcome. For example, an insider could adopt several plans to sell their company stock at varying prices in excess of the current share price, and then cancel the plans authorizing trades at the lowest of these prices upon learning nonpublic information that the insider expects to substantially increase the share price. For similar reasons, we disagree with commenters that the cooling-off period sufficiently addresses our concerns given that an insider could maintain multiple overlapping plans that satisfy the cooling-off period and then cancel plans based on later-obtained material nonpublic information.

In light of comments received, we are making three further modifications to this condition. The first addresses an insider's use of multiple brokers to execute trades pursuant to a single Rule 10b5–1 plan that covers securities held in different accounts. Specifically, a series of separate contracts with different broker-dealers or other agents acting on behalf of the person (other than the issuer) to execute trades thereunder may be treated as a single ''plan,'' provided that the contracts with each broker-dealer or other agent, when taken together as a whole, meet all of the applicable conditions of and remain collectively subject to the provisions of Rule 10b5–1(c)(1). A modification of any such contract will be a modification of each other contract or instruction such single plan. We agree with commenters that in circumstances where a corporate insider holds securities in separate accounts with different financial institutions, the execution of trades by multiple brokers under a Rule 10b5–1 plan is less likely to raise the concerns underlying this condition of the rule. We recognize that a trader will typically enter into a formally distinct contract or agreement with each agent authorized to conduct trades. Thus, for purposes of the multiple overlapping plans restriction, a series of formally distinct such contracts may be treated as a single ''plan'' where taken together the contracts otherwise satisfy the conditions of the rule. As we have described, the overlapping-plans condition is intended to prevent selective alteration or cancellation of Rule 10b5–1 plans to achieve a particular trading outcome when an insider is aware of material nonpublic information, and for that reason, we are providing that modification (as defined in the Rule) of a contract with any given agent will also be treated as a modification of the other contracts making up the plan.

In addition, the final amendment provides that a broker-dealer or other agent executing trades on behalf of the insider pursuant to the Rule 10b5–1 plan may be substituted by a different broker-dealer or other agent as long as the purchase or sales instructions applicable to the substituted broker and the substitute are identical, including with respect to the prices of securities to be purchased or sold, dates of the purchases or sales to be executed, and amount of securities to be purchased or sold. Under this provision, an insider will not lose the benefit of the affirmative defense where the insider closes a securities account with a financial institution and transfers the securities to a different financial institution. If an insider provides instructions to the new broker-dealer in accordance with this provision, there is more limited possibility for selective cancellation because substituting a broker authorized to trade under a Rule 10b5–1 plan would not change the remaining trades in ways that likely would allow the insider to profit on material nonpublic information. We note, however, that a plan modification, such as the substitution or removal of a broker that is executing trades pursuant to a Rule 10b5–1 arrangement on behalf of the insider that changes the purchase or sale amount, price or date on which purchases or sales are to be executed is a termination of such plan and the adoption of a new plan. This will further limit opportunities for opportunistic manipulation of broker-dealers executing trades on behalf of the insider.

The second change permits persons (other than the issuer) to maintain two separate Rule 10b5–1 plans at the same time so long as trading under the later-commencing plan is not authorized to begin until after all trades under the earlier-commencing plan are completed or expire without execution.[179] This provision would not be available for the later-commencing plan, however, if the first trade under the later-commencing plan is scheduled to begin during the ''effective cooling-off period''—namely, the cooling-off period that would be applicable under paragraph (c)(1)(ii)(B) to the later-commencing plan if the date of adoption of the later-commencing plan were deemed to be the date of termination of the earlier-commencing plan.[180] Absent this qualification, an

[177] *See* letter from Davis Polk.

[178] *See* letter from NASAA.

[179] *See* Rule 10b5–1(c)(1)(ii)(D) which provides that a contract, instruction, or plan that would meet the other requirements of Rule 10b5–1(c)(1)(i) may still qualify for the affirmative defense where the director or officer has one other contract, instruction, or plan that would qualify for the affirmative defense for purchases or sales of the same class of securities on the open market and trading under one contract, instruction, or plan (''later-commencing plan'') is not authorized to begin until after all trades under the other contract, instruction, or plan (''earlier-commencing plan'') are completed.

[180] For example, an insider who is not an officer or director has in place an existing Rule 10b5–1 plan with a scheduled date for the latest authorized trade of May 31, 2023. On May 1, 2023, that insider adopts a later-commencing plan, intended to qualify for the affirmative defense under Rule 10b5–1, with a scheduled date for the first authorized trade of June 1, 2023. If the insider terminates the earlier-commencing plan on May 15, the later-commencing plan will not receive the benefit of the affirmative defense, because June 1 is within 30 days of May 15, the date of termination of the earlier-commencing plan, and thus June 1 is during

Continued

insider might cancel the earlier-commencing plan before its scheduled completion but still trade under the later-commencing plan in fewer than the minimum 90 days (or 30 days) that would otherwise be required for a new plan that is established after a plan termination. Both plans must meet all other conditions of the affirmative defense, including the cooling-off period. Under these circumstances, we agree with commenters that there would be a much lower risk of a corporate insider who is aware of material nonpublic information profiting by opportunistically canceling a trading plan as the Rule 10b5–1 plans would not authorize trading during the same period of time.

Third, we are adopting a modification for plans authorizing certain ''sell-to-cover'' transactions in which an insider instructs their agent to sell securities in order to satisfy tax withholding obligations at the time an award vests. Under this modification, an insider will not lose the benefit of the affirmative defense with respect to an otherwise eligible Rule 10b5–1 plan if the insider has in place another plan that would qualify for the affirmative defense, so long as the additional plan or plans only authorize qualified sell-to-cover transactions. Such plans that authorize only such qualified sell-to-cover transactions are eligible for the affirmative defense notwithstanding the fact that the insider may have another plan eligible for the affirmative defense in place. A plan authorizing sell-to-cover transactions is qualified for this provision where the plan authorizes an agent to sell only such securities as are necessary to satisfy tax withholding obligations incident to the vesting of a compensatory award, such as restricted stock or stock appreciation rights, and the insider does not otherwise exercise control over the timing of such sales.[181]

We are providing this modification because we agree with commenters who contended that under these limited circumstances, there is little danger of opportunistic trading. Because vesting schedules are generally set in advance by the issuer, the amount of securities to be sold would be determined by the value of the award and the taxes due on that value. We are further stipulating that eligible plans cannot provide the insider with control over the timing of any sales. For these reasons, we think it is highly unlikely that insiders would be able to make opportunistic use of such additional plans.

We are not extending this modification to include sales incident to the exercise of option awards because it could create a risk of opportunistic trading. Option exercises occur at the discretion of the insider, and such decisions could occur when the insider later obtains material nonpublic information. To the extent that commenters have suggested that an insider with a sell-to-cover plan tied to an option exercise could not use the revised Rule 10b5–1 affirmative defense, we disagree.[182] The revised affirmative defense would not prevent a corporate insider from entering into a Rule 10b5–1 plan that includes instructions directing a broker to sell securities sufficient to meet the tax withholding obligations incident to an option or similar award exercise. For example, the insider might provide that a designated agent is authorized to sell sufficient securities to cover any tax withholding obligations incident to an option exercise. Such instructions can be included in a single Rule 10b5–1 plan along with instructions to sell based on other financial variables. Accordingly, an officer or director may take advantage of the affirmative defense both for sell-to-cover transactions and other planned trades, provided that the conditions of the affirmative defense are met, including the cooling-off period.

In addition, we are not adopting the proposed limitation on multiple plans and single-trade plans for the issuer at this time. As with the cooling-off period, we believe that further consideration of potential application to the issuer is warranted.

Finally, we are adopting the proposed limitation on single-trade plans with modifications. Consistent with the approach to multiple overlapping plans, the limitation will apply to the Rule 10b5–1 plans of all persons, other than the issuer. As a result, the final rule provides that if the contract, instruction, or plan is designed to effect the open-market purchase or sale of the total amount of securities as a single transaction, the contract, instruction or plan will not receive the benefit of the affirmative defense unless: (1) the person who entered into the contract, instruction, or plan has not, during the prior 12-month period, adopted another contract, instruction, or plan that was designed to effect the open-market purchase or sale of the total amount of securities subject to that plan in a single transaction; and (2) such other contract, instruction, or plan in fact was eligible to receive the affirmative defense. A person (other than the issuer) will be able to rely on the Rule 10b5–1(c)(1)(ii) affirmative defense for only one single-trade plan during any 12-month period. The defense will only be available for a single-trade plan if the person had not, during the preceding 12-month period, adopted another single-trade plan, where the other plan qualified for the affirmative defense under Rule 10b5–1.[183] We disagree with the commenter who argued that, due to the possibility that an insider might divide their planned single trade into multiple trades, any limit on single-trade plans would be ineffective.[184] For example, certain insiders who divide a planned trade over several days are likely to realize reduced profits from trading after a Form 4 is filed, which at least in part, will reduce an insider's incentives to engage in trading while aware of material nonpublic information.

For this purpose, a plan is ''designed to effect'' the purchase or sale of securities as a single transaction when the contract, instruction, or plan has the practical effect of requiring such a result. In contrast, a plan is not designed to effect a single transaction where the plan leaves the person's agent discretion over whether to execute the contract, instruction, or plan as a single transaction. Similarly, a plan is also not designed to effect the purchase or sale of securities as a single transaction when (1) the contract, instruction, or plan does not leave discretion to the agent, but instead provides that the agent's future acts will depend on events or data not known at the time the plan is entered into, such as a plan providing for the agent to conduct a certain volume of sales or purchases at each of several given future stock prices; and (2) it is reasonably foreseeable at the time the plan is entered into that the contract, plan, or instruction might result in multiple transactions.

We are adopting the limitation on single-trade plans because we are concerned that trades under such plans may provide particularly profitable opportunities for insiders who are trading while aware of material

the ''effective cooling-off period.'' However, if the later-commencing plan were scheduled to begin trading on July 1, 2023, it could still receive the benefit of the affirmative defense because July 1, 2023 is more than 30 days after May 15 and thus is outside the ''effective cooling-off period.''

[181] In our view, a plan that authorizes an agent to sell only such securities as are necessary to satisfy tax withholding obligations incident to the vesting of a compensatory award meets the requirement that the plan does ''not permit the person to exercise any subsequent influence over how, when, or whether to effect . . . sales,'' Rule 10b5–1(c)(1)(B)(3) [17 CFR 240.10b5–1(c)(1)(B)(3)].

[182] *See supra* note 161.

[183] We have added this qualification because we do not intend for a plan that is ineligible for the affirmative defense to preclude the affirmative defense for another plan, even if both trades are single-trade plans.

[184] *See* letter from Davis Polk.

nonpublic information. As we described in the Proposing Release, a recent study found that trades under a single-trade plan avoid losses that appear statistically unlikely to be avoided by uninformed traders.[185] This pattern persisted even when the first such trade occurred more than 120 days after adoption of the plan, suggesting that a cooling-off period alone may not be sufficient to prevent opportunistic single-trade plans.[186] For these reasons, we disagree with the commenters who suggested that the cooling-off period would be sufficient to address the problem addressed by the single-trade limitation.[187]

Several commenters expressed concern about potential ambiguity or uncertainty around the concept of a single-trade plan and asked us to clarify the scope of this provision, such as its potential application to block trades of venture capital funds.[188] We agree with those commenters who indicated that an insider should not be at risk of losing the benefit of the affirmative defense due to decisions outside the insider's control when the insider did not design the Rule 10b5–1 plan to effect the authorized purchases or sales in a single transaction, such as in the case where the insider's agent exercises their own discretion to complete all authorized trading in a single transaction. For that reason, we have added the ''designed to effect'' provision discussed above. We are concerned, however, that further delineating what constitutes a single transaction for purposes of this rule could create incentives to design Rule 10b5–1 plans that avoid application of the single-trade plan limitation.

For reasons similar to those we have explained with respect to multiple overlapping trades, in response to comments, we are modifying the proposed single-trade limitation with respect to qualified sell-to-cover transactions. This modification applies to the same plans eligible for the sell-to-cover provision of the overlapping trade limitation. Again, we think that such plans present little, if any risk, of opportunistic trading.

Also for reasons similar to those we have explained with respect to multiple overlapping trades, we are applying the single-trade limitation to all persons other than the issuer. The single-trade limitation helps to ensure that the affirmative defense provides meaningful constraints on the extent to which material nonpublic information affects an insider's decision to trade. While we recognize that the limitation also may impose some moderate limitations on insiders' ability to obtain liquidity and diversification, as noted, we think that there are alternative means for such insiders to achieve these goals.

Because single-trade plans may have legitimate uses to address one-time liquidity needs, we also disagree with the commenter who suggested that the affirmative defense should not be available for any single-trade plan.[189] Overall, the limitation we are adopting is intended to balance legitimate uses of single-trade plans against the potential for abuse.

4. The Amended Good Faith Condition

a. Proposed Amendments

The Rule 10b5–1(c)(1) affirmative defense is only available if a trading arrangement was entered into in good faith and not as part of a plan or scheme to evade the prohibitions of the rule. The Commission proposed to amend this condition to require that the contract, instruction, or plan also be ''operated'' in good faith.

In proposing this amendment, the Commission noted its concern that some corporate insiders may try to improperly influence the timing of corporate disclosures to benefit their trades under a Rule 10b5–1 trading arrangement, such as by delaying or accelerating the release of material nonpublic information.[190] The Commission also noted its concern that a Rule 10b5–1 plan may be canceled or modified in an attempt to evade the prohibitions of the rule without affecting the availability of the affirmative defense. Moreover, the Commission stated that requiring that a trader both enter into and operate a Rule 10b5–1 plan in good faith would help deter fraudulent and manipulative conduct and enhance investor protection throughout the duration of the trading arrangement. Thus the Commission intended the proposed amendment to make clear that the affirmative defense would not be available to a trader who, for example, modifies their plan in an effort to evade the prohibitions of the rule or uses their influence to affect the timing of corporate disclosure to occur before or after a planned trade to make it more profitable or to avoid or reduce a loss.

b. Comments on the Proposed Amendments

Several commenters generally supported the proposed amendment.[191] Some of these commenters indicated that the proposed amendment would deter opportunistic trading in connection with Rule 10b5–1 plans and increase investor confidence.[192] One of these commenters also expressed the view that, among other things, this requirement would ensure that there is liability where persons attempt to manipulate the timing of corporate announcements to benefit trades made pursuant to a Rule 10b5–1 plan.[193] Another commenter asserted that adding the ''operate in good faith'' requirement would be helpful in improving the insider trading compliance programs of issuers.[194]

A number of commenters, however, opposed adding the condition that a Rule 10b5–1 plan be ''operated'' in good faith.[195] Many of these commenters indicated that the concept of ''operated in good faith'' was not sufficiently clear and would lead to uncertainty surrounding the availability of the affirmative defense.[196] Similarly, another commenter asked the Commission to clarify the extent to which a failure to operate a Rule 10b5–1 plan in good faith would invalidate the affirmative defense for transactions that were executed under the plan.[197] Some commenters contended that, given that the scope of conduct or activity covered by the phrase was potentially extensive, this condition could inhibit the use of Rule 10b5–1 plans.[198] Finally, another commenter suggested requiring that a Rule 10b5–1 plan be ''modified in good faith'' as an alternative.[199] This commenter contended that ''modified'' is a clearer term and would cover circumstances where a trader amends or terminates a Rule 10b5–1 plan based on material nonpublic information.

[185] *See* Gaming the System, *supra* note 20 at 2, 14 (observing that ''trades of single-trade plans are consistently loss-avoiding regardless of cooling-off period''). *But see infra* note 400.

[186] *See id.*

[187] *See* letters from Manulife, Cravath, NAM, and Cleary.

[188] *See* letters from Sullivan, SIFMA 3 and NVCA.

[189] *See* letter from NASAA.

[190] *See* Proposing Release, *supra* note 23, at 8693.

[191] *See, e.g.,* letters from CII, AFL–CIO, Better Markets, CO PERA, NYCC, NASAA, NYSE, and O'Reilly.

[192] *See, e.g.,* letters from AFL–CIO, Better Markets, CII, and NASAA.

[193] *See* letter from Better Markets.

[194] *See* letter from O'Reilly.

[195] *See, e.g.,* letters from Dow, Quest, HRPA, Cleary, Cravath, Davis Polk, DLA, Fenwick, Shearman, Wilson Sonsini, PNC, SIFMA 2, and SIFMA 3.

[196] *See, e.g.,* letters from Quest, Cleary, Cravath, Davis Polk, DLA, Fenwick, Shearman, Wilson Sonsini, and PNC, SIFMA 2, SIFMA 3 and Chamber of Commerce 2.

[197] *See* letter from PNC.

[198] *See, e.g.,* letters from Dow, Quest, HRPA, Cleary, Cravath, Davis Polk, DLA, Fenwick, Shearman, Wilson Sonsini, PNC, SIFMA 2, and SIFMA 3.

[199] *See* letter from Fenwick.

c. Final Amendment

Having considered the comments received, we are adopting the amendment to Rule 10b5–1(c)(1)(ii) with a modification in response to comments concerning the term ''operated in good faith.'' The final rules add the condition that the person who entered into the Rule 10b5–1 contract, instruction, or plan ''has acted in good faith with respect to'' the contract, instruction, or plan. As discussed above, since the time that Rule 10b5–1 was adopted, we have become concerned that corporate insiders may take actions after adopting a Rule 10b5–1 plan to benefit from material nonpublic information the insider acquires after establishment of the plan. We therefore agree with commenters that this requirement will help ensure that traders do not engage in opportunistic trading in connection with Rule 10b5–1 plans, and will help deter corporate insiders from improperly influencing the timing of corporate disclosures to benefit their trades under such a plan.[200]

Many commenters appeared to understand that the proposed ''operated in good faith'' language was intended to govern the behavior of the trader.[201] Some commenters, however, expressed concern that the term ''operated'' could be ambiguous or cause confusion because it could be read to apply, or might apply only, to the insider's agents, such as brokers who executed the trades authorized by the insider.[202] To make clear that the good faith obligation applies to the activities of the insider (including the insider's efforts to direct the activities of others), we have modified this language to state that the trader must ''act[ ] in good faith with respect to the contract, instruction, or plan.''

In adopting this amendment, we disagree with commenters that the expanded good faith requirement is not sufficiently clear. The concept of ''good faith'' should be familiar to corporate insiders as it has been a component of Rule 10b5–1 since its adoption two decades ago.[203] This amendment extends this familiar concept from the time of adoption through the duration of the Rule 10b5–1 plan to better ensure that material nonpublic information does not factor into the decision to trade under such plans, as it would when, for example, a corporate insider materially modifies a planned trade at their own direction and to their own benefit,[204] based on material nonpublic information acquired after the plan was entered into. Indeed, a corporate insider would not be operating a Rule 10b5–1 plan in good faith if the corporate insider, while aware of material nonpublic information, directly or indirectly induces the issuer to publicly disclose that information in a manner that makes their trades under a Rule 10b5–1 plan more profitable (or less unprofitable). In such a scenario, notwithstanding that the Rule 10b5–1 plan may have been adopted or entered into in good faith, the corporate insider would not be entitled to the affirmative defense. Moreover, we disagree with commenters who argue that this requirement will deter adoption of Rule 10b5–1 plans by individuals who do not intend to misuse material nonpublic information.

Commenters also asked us to clarify whether the obligation to act in good faith would not be met in other factual settings, such as in the event an issuer halts any trading by insiders under Rule 10b5–1 plans due to a possible merger, or where it similarly blocks sales transactions after learning of material nonpublic information that it expects will lead to a decline in the market price of its securities.[205] As we have stated, this amendment relates to activities within the control of the insider. Accordingly, we agree with the commenter that cancellations directed by the issuer where such cancellations are outside the control or influence of the insider may not, by themselves, implicate the good faith condition.

Finally, we disagree with the commenter who recommended that we instead require good faith ''modification'' of a plan as this narrower condition would not address all of our concerns. For example, as we have noted, efforts to manipulate the timing of releases of corporate information to benefit an officer's or a director's planned trades may not involve a modification of a plan but would be inconsistent with established notions of good faith. While the condition that we are adopting would cover such efforts, the commenter's alternative might not do so.

B. Additional Disclosures Regarding Rule 10b5–1 Trading Arrangements

Currently, there are no mandatory disclosure requirements concerning the use of Rule 10b5–1 trading arrangements or other trading arrangements by issuers or corporate insiders.[206] The lack of comprehensive public information about the use of these arrangements—whether pursuant to a Rule 10b5–1 plan or otherwise—creates an environment in which it is more difficult for investors to assess whether those parties may be misusing their access to material nonpublic information. This lack of transparency may allow improper trading to go undetected and thereby undermine the deterrent impact of our insider trading laws. In addition, the lack of public information about the use of these arrangements by corporate insiders limits investors' ability to assess potential incentive conflicts and information asymmetries when making investment and voting decisions. Requiring more robust disclosure of particular trading arrangements should reduce potential abuse of the rule, and inform investors and the Commission regarding potential violations of Rule 10b–5.

In addition, issuers are currently not required to disclose their insider trading policies or procedures. In the Proposing Release, the Commission stated that information about insider trading policies and procedures is important, and would help investors to understand and assess how the registrant protects material nonpublic information from misuse. While the codes of ethics that registrants are required to disclose pursuant to Item 406 of Regulation S–K may address insider trading issues, they may lack the detail necessary for investors to assess actual practices

[200] *See, e.g.,* letters from AFL–CIO, Better Markets, CII, and NASAA.

[201] *See* letters from Davis Polk, DLA Piper, Dow, Home Depot, and Shearman & Sterling.

[202] *See* letters from Cravath, Fenwick, and PNC.

[203] *See* 2000 Adopting Release, *supra* note 8.

[204] A modification of a Rule 10b5–1 plan in an effort to allow the individual to trade on the basis of material nonpublic information would not constitute acting in good faith. In light of our adoption of a limitation on multiple plans, however, we anticipate that an individual will generally not be able to engage in any trade under a Rule 10b5–1 plan following a cancellation of such a plan, and therefore the applicability of the affirmative defense will not be at issue in that situation.

[205] *See, e.g.,* letters from Davis Polk, Shearman (requesting that we clarify that cancellations for legitimate reasons are not bad faith); and Wilson Sonsini (requesting we clarify that cancellations are not per se bad faith).

[206] Form 144 (17 CFR 239.144) under the Securities Act contains a representation that is used by a filer of the form to indicate whether such person has adopted a written trading plan or given trading instructions to satisfy Rule 10b5–1. Form 144 is a notice form that must be filed with the Commission by an affiliate of an issuer who intends to resell restricted or ''control'' securities of that issuer in reliance upon Securities Act Rule 144 (17 CFR 230.144). In 2002, the Commission proposed amendments to Form 8–K that, among other things, would have required registrants to report on the form any adoption, modification or termination of a Rule 10b5–1 trading arrangement by any director and certain officers of the registrant. *See Form 8–K Disclosure of Certain Management Transactions,* Release No. 33–8090 (Apr. 12, 2002) [67 FR 19914 (Apr. 23, 2002)]. The Commission did not adopt this proposal.

surrounding potential insider trading. General statements such as that an issuer ''has a policy regarding insider trading'' or ''prohibits insider trading'' do not meaningfully assist investors in their assessments of whether an issuer's efforts to prevent insider trading are likely to be effective. While not every individual component of an insider trading policy is necessarily material on its own, together, a comprehensive description of an insider trading policy can help investors to assess the thoroughness and seriousness with which the issuer addresses the prohibition of trading on the basis of material nonpublic information by its officers, directors and employees. More detailed disclosure about these policies and procedures could therefore improve investor confidence, and in turn, potentially contribute to market liquidity and capital formation.

To address these information gaps, the Commission proposed new Item 408 under Regulation S–K and corresponding amendments to Forms 10–Q and 10–K to require: (1) quarterly disclosure of the use of Rule 10b5–1 and other trading arrangements by a registrant, and its directors and officers for the trading of the issuer's securities; and (2) annual disclosure of a registrant's insider trading policies and procedures. The Commission also proposed new Item 16J to Form 20–F to require similar annual disclosure of a foreign private issuer's insider trading policies and procedures. In addition, the Commission proposed amendments to Forms 4 and 5 to require insiders to identify whether a reported transaction was executed pursuant to a Rule 10b5–1(c) trading arrangement.

1. Quarterly Reporting of Rule 10b5–1 and Non-Rule 10b5–1 Trading Arrangements

a. Proposed Amendments

Proposed new Item 408(a) of Regulation S–K would require registrants to disclose:

- Whether, during the registrant's most recently completed fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report), the registrant adopted or terminated any contract, instruction or written plan to purchase or sell securities of the registrant, whether or not intended to satisfy the affirmative defense conditions of Rule 10b5–1(c), and provide a description of the material terms of the contract, instruction or written plan, including:
  - The date of adoption or termination; [207]
  - The duration of the contract, instruction or written plan; and
  - The aggregate amount of securities to be sold or purchased pursuant to the contract, instruction or written plan.
- Whether, during the registrant's last fiscal quarter, any director or ''officer'' (as defined in Rule 16a–1(f)) has adopted or terminated any contract, instruction or written plan for the purchase or sale of securities of the registrant, whether or not intended to satisfy the affirmative defense conditions of Rule 10b5–1(c), and provide a description of the material terms of the contract, instruction or written plan, including:
  - The name and title of the director or officer;
  - The date on which the director or officer adopted or terminated the contract, instruction or written plan;
  - The duration of the contract, instruction or written plan; and
  - The aggregate number of securities to be sold or purchased pursuant to the contract, instruction or written plan.

Under the proposed rule, the disclosures would be required in Forms 10–Q and 10–K, as applicable. Registrants would be required to provide this information if, during the quarterly period covered by the report, the registrant, or any director or officer who is required to file reports under Section 16 of the Exchange Act, [208] adopted or terminated a Rule 10b5–1 plan. Such disclosures would allow investors to assess whether, and if so, how, issuers monitor trading by their directors and officers for compliance with insider trading laws and whether their compliance programs are effective at preventing the misuse of material nonpublic information.

The Commission stated that the proposed rule would provide material information that would better allow investors, the Commission, and other market participants to observe how directors, officers and issuers use Rule 10b5–1 plans. For example, disclosure of the termination (including a modification) of a trading arrangement by an officer, even in the absence of subsequent trading by the officer, could provide investors or the Commission with important information about the potential misuse of inside information such as, for example, if the termination occurs close in time to the release of material nonpublic information by the issuer. Making information about these arrangements public may also serve as a deterrent against potential abuses of Rule 10b5–1 plans or other trading arrangements by making those who use these arrangements more likely to focus on following the requirements applicable to such arrangements and compliance with Rule 10b–5. In addition, requiring disclosure of these events on a quarterly basis would present this disclosure to investors in a consolidated manner in a single document. The Commission also proposed to require similar disclosure with respect to the adoption or termination of other pre-planned trading contracts, instructions, or plans (''non-Rule 10b5–1 trading arrangements'') through which the issuer, officer or director seeks to transact in the issuer's securities.

b. Comments on the Proposed Amendments

Many commenters generally supported the proposed reporting requirements.[209] For example, one of these commenters stated that the proposed disclosures would provide important information regarding insider stock trades and useful information to investors to inform their own investment decisions.[210] Another commenter asserted that the proposed disclosures would provide long-term shareholders with information about insider trades that complete the partial picture provided by Form 144 and Section 16 reports.[211] A few commenters supported the proposed requirements, but asked that issuers also report plans with respect not only to officers and directors, but also more generally any employee of the issuer.[212]

Several commenters, however, did not support the proposed reporting requirements.[213] Some of these commenters contended that the proposed disclosures are unnecessary because they would be duplicative of the disclosures that would be required under the proposed amendments to Forms 4 and 5.[214] One of these commenters also asserted that it would be a significant burden on issuers to

[207] As discussed above, the Commission also proposed to state explicitly in the rule that any modification or amendment of an existing Rule 10b5–1 trading arrangement would be the equivalent of terminating the existing arrangement and adopting a new arrangement. *See supra* note 46.

[208] 15 U.S.C. 78p.

[209] *See, e.g.,* letters from AFL–CIO, Better Markets, CII, CO PERA, DLA, ICGN, NASAA, O'Reilly, and Simpson.

[210] *See* letter from AFL–CIO.

[211] *See* letter from CII.

[212] *See, e.g.,* letters from BrilLiquid and NASAA.

[213] *See, e.g.,* letters from ACCO, IBC, MD Bar, NVCA, NAM, SCG, Sullivan and Wilson Sonsini.

[214] *See, e.g.,* letters from Sullivan and Wilson Sonsini.

provide the proposed disclosures concerning all of the trading actions of their directors and officers.[215]

A number of commenters expressed concern regarding the requirement for registrants to provide a description of the ''material terms'' of the Rule 10b5–1 trading arrangement.[216] Several commenters indicated that the proposal could be interpreted as requiring registrants to disclose specific details of a trading arrangement, such as pricing information.[217] Many commenters stated that the disclosure of pricing information and other details of a Rule 10b5–1 plan could facilitate the front-running of transactions under the plan by other traders.[218]

Due to these concerns, commenters were divided in their recommendations of what information about trading arrangements should be disclosed. Some commenters stated that the final rule should not require disclosure of the number of shares covered by a trading arrangement or the duration of the arrangement.[219] Other commenters recommended that the Commission limit disclosures to the name of the person adopting the plan, the date of adoption or termination of the plan, and the plan's duration.[220] In contrast, other commenters opposed requiring disclosure of the termination of a plan, contending that this information could signal to the market that there has been a material development concerning the issuer, such as an impending merger agreement.[221]

In addition, a number of commenters recommended that the Commission should not require disclosure regarding non-Rule 10b5–1 trading arrangements.[222] Several commenters asserted that this term was confusing and overly broad.[223] One commenter indicated that this term would raise a number of interpretive issues as it potentially encompasses a wide range of transactions, such as transactions related to open market purchases, derivative securities and employee benefit plans.[224] Other commenters claimed that this disclosure would not provide valuable information to investors, the Commission, or other market participants.[225] For example, some of these commenters stated that the details of trades executed under a non-Rule 10b5–1 trading arrangement are already required to be disclosed in Section 16 filings.[226]

A few commenters recommended that the disclosure requirements regarding registrant trading arrangements should be removed from proposed Item 408(a) and included with the pending proposed rulemaking[227] to update the disclosure requirements for purchases of equity securities by an issuer and affiliated purchasers under Item 703 of Regulation S–K.[228]

Another commenter suggested the Commission exempt smaller reporting companies (''SRCs'')[229] from the proposed disclosure requirement.[230] This commenter claimed SRCs and their insiders are less likely to engage in the kinds of trading in the securities of their companies that would cause concern, but that the reporting burden could disproportionately impact these issuers.

Finally, one commenter suggested that it would be more appropriate to include proposed Item 408(a) disclosure in Part II, Item 9(B) of Form 10–K, and Item 408(b) disclosure in Part III, Item 10 of Form 10–K.[231] This commenter claimed that requiring Item 408(a) disclosure in Item 9(B) rather than Item 10 of Form 10–K would align with the Commission's proposal to require Item 408(a) disclosure in Item 5 of Form 10–Q because both Items cover similar types of information. Further, this commenter posited that this approach would ensure that Item 408(a) disclosure, which relates to the last fiscal quarter, appears in each periodic report.

c. Final Rule

We are adopting new Item 408(a) with several modifications in response to comments. Specifically, we are not adopting the proposed requirement regarding contracts, instructions, or plans of registrants; we are providing that the description of material terms need not address pricing terms; and we are adding a definition of ''non-Rule 10b5–1 trading arrangement.'' As proposed, these disclosures will be required in Forms 10–Q and 10–K.[232]

The final rule will require registrants to (1) disclose whether, during the registrant's last fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report), any director or ''officer'' (as defined in Rule 16a–1(f)) has adopted or terminated (i) any contract, instruction or written plan for the purchase or sale of securities of the registrant that is intended to satisfy the affirmative defense conditions of Rule 10b5–1(c) (a ''Rule 10b5–1(c) trading arrangement''), and/or (ii) any written trading arrangement for the purchase or sale of securities of the registrant that meets the requirements of a non-Rule 10b5–1 trading arrangement as defined in Item 408(c) (a ''non-Rule 10b5–1 trading arrangement''); and (2) provide a description of the material terms of the Rule 10b5–1 trading arrangement or non-Rule 10b5–1 trading arrangement other than terms with respect to the price at which the individual executing the respective trading arrangement is authorized to trade, such as:

- The name and title of the director or officer;
- The date of adoption or termination of the trading arrangement;
- The duration of the trading arrangement; and
- The aggregate number of securities to be sold or purchased under the trading arrangement.

With respect to any given trading arrangement subject to disclosure under Item 408(a), the registrant must indicate whether such trading arrangement is a Rule 10b5–1 trading arrangement or is a non-Rule 10b5–1 trading arrangement.

In addition, any modification or change to a Rule 10b5–1 plan by a director or officer that falls within the meaning of new Rule 10b5–1(c)(1)(iv) would also be required to be disclosed under Item 408(a) as it constitutes the termination of an existing plan and the adoption of a new contract, instruction, or written plan.

[215] *See* letter from Sullivan.

[216] *See, e.g.,* letters from ABA, Davis Polk, Cleary, DLA, FedEx, Fenwick, Kirkland, NVCA, NAM, Quest, SCG, SIFMA 2, Sullivan and Wilson Sonsini.

[217] *See, e.g.,* letters from ABA, Cleary, Davis Polk, DLA, Fenwick, Quest, SCG, SIFMA 2, and Wilson Sonsini.

[218] *See, e.g.,* letters from Davis Polk, DLA, Fenwick, NVCA, SCG, SIFMA 2, and Wilson Sonsini.

[219] *See, e.g.,* letters from Quest and Simpson.

[220] *See, e.g.,* letters from Fenwick and Shearman.

[221] *See* letters from Sullivan and SIFMA 3.

[222] *See, e.g.,* letters from Cleary, Cravath, Davis Polk, Shearman, Sullivan, and Simpson.

[223] *See, e.g.,* letters from Cleary, Cravath, SIFMA 3, and Sullivan.

[224] *See* letter from Sullivan.

[225] *See, e.g.,* letters from Cleary, Cravath, Shearman, and Simpson.

[226] *See, e.g.,* letters from Cravath and Shearman.

[227] *See Share Repurchase Disclosure Modernization,* Release No. 34–93783 (Dec. 15, 2021) [87 FR 8443 (Feb. 15, 2022)].

[228] *See, e.g.,* letters from Cravath and Simpson.

[229] ''Smaller reporting company'' is defined in Securities Act Rule 405 and Exchange Act Rule 12b–2 as an issuer that is not an investment company, an asset-backed issuer (as defined in 17 CFR 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that had: (1) a public float of less than $250 million; or (2) annual revenues of less than $100 million and either: (a) no public float; or (b) a public float of less than $700 million.

[230] *See* letter from MD Bar.

[231] *See* letter from ABA.

[232] In a slight modification, we are adopting the approach suggested by a commenter to include new Item 408(a) in Part II, Item 9(B) of Form 10–K. *See* letter from ABA.

Having considered comments received, we view this information as necessary to better allow investors, the Commission, and other market participants to observe how directors and officers use Rule 10b5–1 plans and other non-Rule 10b5–1 trading arrangements. The information also will add important context to other disclosures of trades by directors and officers, such as in Forms 4 and 5, and may aid investors in obtaining a more accurate valuation of the issuer's shares and making more informed investment decisions.[233] Furthermore, this information will provide investors with valuable information about the specific uses of such arrangements, which could bring focus to the particular arrangements and deter potential abuses. While it is true, as commenters observed, that Forms 4 and 5 may already include some of this information, we expect it will be more useful and time-saving for investors to have information regarding all of the trading arrangements for directors and officers of a given issuer in a single location. We are also requiring disclosure of details about the content of such arrangements that is not mandated on Form 4 or Form 5, which, pursuant to the amendments that we are adopting as described below, will require only the date of adoption of the Rule 10b5–1 plan.

In response to the concerns expressed by some commenters that the proposal could require the disclosure of pricing information,[234] however, we have revised the final rules to clarify that new Item 408(a) does not require disclosure of the price at which the individual executing the trading arrangement is authorized to trade. We agree with these commenters that disclosing this information could allow other persons to trade strategically in anticipation of an officer's or a director's planned trades, increasing the costs or reducing the profitability of that officer's or director's trading. Although we recognize that some commenters urged us to not require disclosure of the trading arrangement's duration or the aggregate number of securities that could be purchased and sold under it, we view this information as necessary context for a trading arrangement that does not raise similar concerns because, in most cases, general information about the volume and duration of an officer's or director's Rule 10b5–1 plan or non-Rule 10b5–1 trading arrangement will not be sufficient to permit strategic trades by other market participants. We also disagree with commenters that we should not require disclosure related to terminations because, first, Rule 10b5–1 plans or non-Rule 10b5–1 trading arrangements may be terminated for many reasons, making it unlikely that a termination would be interpreted as an indication of a pending material event (such as a merger announcement), and second, because the interval between a termination and the filing of the Form 10–Q or Form 10–K disclosing the termination should mitigate any such potential strategic trading.

In addition, the final rule will also require disclosure regarding the adoption or termination of non-Rule 10b5–1 trading arrangements. In response to the concerns expressed by some commenters that the term ''non-Rule 10b5–1 trading arrangements'' was confusing and overly broad,[235] we are adopting a definition of this term to clarify the types of pre-planned trading arrangements that should be disclosed under Item 408(a). To ensure that market participants are familiar with how to apply this concept, the definition we adopt accords with the requirements of the Rule 10b5–1 affirmative defense that the Commission adopted in 2000. Under the final rule, a trading arrangement with respect to a director or ''officer'' (as defined in Rule 16a-1(f)) would be a ''non-Rule 10b5–1 trading arrangement'' where the director or officer asserts that, at a time when they were not aware of material nonpublic information about the security or the issuer of the security, they

- adopted a written arrangement for trading the securities; and
- The trading arrangement:
  - Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be subsequently purchased or sold;
  - Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which the securities were to be purchased or sold; or
  - Did not permit the covered person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the trading arrangement did exercise such influence must not have been aware of material nonpublic information when doing so.

In adopting this requirement, we recognize that Rule 10b5–1 provides affirmative defenses, but that corporate insiders may assert other defenses to liability under Section 10(b). Absent this disclosure requirement, directors and officers may be more likely to choose to trade in reliance on alternative defenses to liability other than this affirmative defense in order to avoid the disclosure requirements for Rule 10b5–1 plans, as well as avoiding the other requirements of the affirmative defense. Further, we believe these disclosures would be useful to investors for largely the same reasons that disclosure of plans that fully satisfy Rule 10b5–1 is useful: they provide important context about how insiders use their trading plans, such as in the case where an insider cancels a plan close in time to the release of material nonpublic information. We therefore disagree with commenters who assert this information would not be useful to investors.

At this time, we are not adopting the proposal to require corresponding disclosure regarding the use of trading arrangements by the issuer. In light of the various comments we received on this proposal,[236] we believe that further consideration of potential application of the disclosure requirement for purchases of equity securities by an issuer is warranted. We are also declining to extend disclosure obligations to plans adopted by insiders other than officers and directors, as suggested by some commenters, because we have concluded that collecting such information could be significantly burdensome for issuers, and because we think that granular disclosure about the adoption, termination, modification, and material terms of such plans is likely to be less important to investors than plans adopted by directors and officers.

Finally, we are not exempting SRCs from the disclosure requirements, as recommended by a commenter.[237] While we are aware of the potential for a disproportionate impact on SRCs, we disagree that corporate insiders at SRCs are less likely to engage in the types of trading with which we are concerned. In our view, stock ownership by corporate insiders is common at SRCs, and exempting SRCs from this disclosure

[233] *See infra* Section V.C.2. The mandatory Rule 10b5–1 plan checkbox disclosures on Forms 4 and 5, in combination with this disclosure will provide greater transparency to investors regarding the use of Rule 10b5–1 plans for trading. All of this information will provide investors with valuable context for interpreting other corporate disclosure, which should help them value the companies' shares and make informed voting and investment decisions.

[234] *See, e.g.,* letters from ABA, Cleary, Davis Polk, DLA, Fenwick, Quest, SIFMA 2, SCG, and Wilson Sonsini.

[235] *See, e.g.,* letter from Sullivan.

[236] *See, e.g.,* letters from Cravath and Simpson.

[237] *See supra* note 230.

requirement would deprive investors in those issuers of material information about the use, and potential abuse, of Rule 10b5–1 plans and non-Rule 10b5–1 trading arrangements by an SRC's officers or directors.

2. Disclosure of Insider Trading Policies and Procedures

a. Proposed Amendments

The Commission proposed new Item 408(b) of Regulation S–K, which would require registrants to:

- Disclose whether the registrant has adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of the registrant's securities by directors, officers, and employees or the registrant itself that are reasonably designed to promote compliance with insider trading laws, rules, and regulations, and any listing standards applicable to the registrant. If the registrant has not adopted such insider trading policies and procedures, explain why it has not done so; and
- If the registrant has adopted insider trading policies and procedures, disclose such policies and procedures.

These disclosures would be required in a registrant's annual reports on Form 10–K and proxy and information statements on Schedules 14A and 14C.[238] Foreign private issuers (''FPIs'') would also be required to provide analogous disclosure in their annual reports pursuant to a new Item 16J in Form 20–F.

In the Proposing Release, the Commission stated that well-designed policies and procedures that address the potential misuse of material nonpublic information can play an important role in deterring and preventing trading on the basis of material nonpublic information. Specific disclosures concerning registrants' insider trading policies and procedures would benefit investors by enabling them to assess registrants' corporate governance practices and to evaluate the extent to which those policies and procedures protect investors from the misuse of material nonpublic information.

Item 406 of Regulation S–K requires a registrant to disclose whether it has adopted a code of ethics that applies to its principal executive officer, chief financial officer, and other appropriate executives and, if it has not adopted such a code, to state why it has not done so.[239] Many registrants also are required to maintain codes of ethics or conduct under exchange listing standards.[240] These codes may contain specific policies and restrictions that address insider trading.[241] Apart from these codes of ethics or conduct, some registrants have other policies and procedures specifically addressing insider trading. The Commission structured the proposed amendments to provide investors with comprehensive information regarding a registrant's insider trading policies and procedures to enable investors to better assess the manner in which the registrant promotes compliance with insider trading laws and protects material nonpublic information from misuse.

The Commission recognized that insider trading policies and procedures may vary from issuer to issuer and that decisions as to specific provisions of the policies and procedures are best left to the issuer. Therefore, the proposed amendments did not specify the information that a registrant would be required to provide regarding its insider trading policies and procedures.

b. Comments on the Proposed Amendments

Commenters were divided over disclosure of a registrant's insider trading policies and procedures. Several commenters generally supported the proposed disclosure.[242] One of these commenters asserted that this disclosure would improve transparency for investors and potentially create incentives for corporate boards and management teams to scrutinize the issuer's ''corporate hygiene'' regarding material nonpublic information and insider trading.[243] Other commenters, however, asserted that the proposed disclosures would not meaningfully benefit investors, or that they would not be material.[244] Another commenter expressed concern that requiring this disclosure in both annual reports and proxy statements would create administrative burdens on issuers by requiring them to craft additional disclosure for two separate compliance documents.[245]

Several commenters recommended modifications to the proposal. For example, several commenters recommended that the Commission should provide flexibility and allow issuers to post their insider trading policies and procedures on their website and direct readers to the posting in their annual report on Form 10–K rather than disclosing such policies in the Form 10–K, similar to the existing disclosure requirements for an issuer's code of ethics under Item 406(c)(2) of Regulation S–K.[246] Another commenter similarly recommended that the final rules should allow issuers to post their insider trading policies and procedures on their website or file their insider trading policy as an exhibit to the annual report to satisfy this disclosure requirement.[247] A few commenters suggested that the final rule should use the word ''describe'' rather than ''disclose'' to elicit disclosure that is consistent in tone and detail with the other Regulation S–K disclosure requirements of the proxy statement or the annual report.[248]

Finally, several commenters recommended that the Commission exempt FPIs from these disclosure requirements.[249] These commenters contended that FPIs are already subject to home country corporate governance disclosure requirements, and that the disclosure requirement could function as an implicit requirement that FPIs adopt insider trading policies.

c. Final Rule

We are adopting new Item 408(b) and new Item 16J with certain modifications in response to comments. Under the final rule,[250] registrants will be required

[238] Item 1 of Schedule 14C requires that a registrant furnish the information called for by all of the items of Schedule 14A (other than Items 1(c), 2, 4 and 5) which would be applicable to any matter to be acted upon at the meeting if proxies were to be solicited in connection with the meeting.

[239] 17 CFR 229.406; *see also* Section 406 of the Sarbanes-Oxley Act of 2002 (''SOX'') [15 U.S.C. 7264].

[240] *See, e.g.,* NYSE Listed Company Manual Section 303A.10 (stating in relevant part that every NYSE ''listed company should proactively promote compliance with laws, rules and regulations, including insider trading laws'' and that ''[i]nsider trading is both unethical and illegal, and should be dealt with decisively''); *see also* NASDAQ Listing Rule 5610 (requiring every Nasdaq listed company to adopt a code of conduct that complies with the definition of a ''code of ethics'' set out in SOX Section 406 (c) and that applies to all directors, officers, and employees).

[241] Insider trading policies and procedures may be part of the standards that are reasonably necessary to promote: honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and compliance with applicable governmental rules and regulations. *See* 15 U.S.C. 7264(c); *see also supra* Section I.

[242] *See, e.g.,* letters from Better Markets, BrilLiquid, CO PERA, CII, ICGN, NASAA, O'Reilly, and Sullivan.

[243] *See* letter from NASAA.

[244] *See, e.g.,* letters from Davis Polk, Home Depot, NAM, and Simpson.

[245] *See* letter from Dow.

[246] *See, e.g.,* letters from Cravath, Fenwick, Home Depot, and Shearman.

[247] *See* letter from Dow.

[248] *See, e.g.,* letters from Davis Polk, and SIFMA 2.

[249] *See, e.g.,* letters from Cravath, Jones Day, SIFMA 2, and Sullivan.

[250] While the Proposing Release stated that proposed Item 408(b)(1) would include insider trading policies and procedures governing the

to disclose whether they have adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of their securities by directors, officers, and employees, or the registrant itself that are reasonably designed to promote compliance with insider trading laws, rules, and regulations, and any listing standards applicable to the registrant. If a registrant has not adopted such insider trading policies and procedures, it must explain why it has not done so. These disclosures will be required in annual reports on Form 10–K and proxy and information statements on Schedules 14A and 14C. Pursuant to new Item 16J in Form 20–F, FPIs will be required to provide analogous disclosure in their annual reports on that form. We disagree that requiring this disclosure in both annual reports and proxy or information statements would impose an unreasonable burden on registrants by requiring them to prepare additional disclosures for two documents as suggested by a commenter.[251] In this regard, we note that under General Instruction G to Form 10–K, a registrant can incorporate by reference the information required by Item 408(b) from a definitive proxy or information statement involving the election of directors, if the proxy or information statement is filed within 120 days of the end of the fiscal year.[252] In a modification of the proposal and in response to comments,[253] the final rules do not require disclosure of the registrant's policies and procedures within the body of the annual report or proxy/information statement. Instead, we are adopting amendments to Item 601 of Regulation S–K and Form 20–F to require issuers to file a copy of their insider trading policies and procedures as an exhibit to Forms 10–K and 20–F, respectively. We considered permitting registrants to post their policies and procedures on their website in lieu of providing disclosure in the filing, as suggested by some commenters,[254] similar to Item 406(c)(2), which allows a registrant to post its codes of ethics on its website and disclose the internet address in its annual report to satisfy the code of ethics disclosure requirement. Requiring registrants to file their insider trading policies and procedures as an exhibit would make the document available online through our Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system. Documents that are filed as exhibits to registration statements and periodic reports must be hyperlinked from the exhibit index of the document,[255] which facilitates investor access to the exhibit.

EDGAR allows active hyperlinks to documents that are filed on EDGAR but does not allow hyperlinks to non-EDGAR documents.[256] We therefore believe that the approach of hyperlinking to an exhibit filed on EDGAR would facilitate better access for investors as compared to permitting registrants to post their insider trading policies and procedures on their website and provide a web address (without a hyperlink) in their annual report. If all of the registrant's insider trading policies and procedures are included in its code of ethics (as defined in Item 406(b)) and the code of ethics is filed as an exhibit pursuant to Item 406(c)(1), a hyperlink to that exhibit accompanying the registrant's disclosure as to whether it has insider trading policies and procedures would satisfy this component of the disclosure requirement.

We disagree with commenters who suggested that the disclosure regarding these policies and procedures would not be material and useful information to investors. The thoroughness and precision of such policies and procedures may help investors to understand whether they will be successfully implemented, even if any single detail taken on its own may not otherwise be material. An investor might reasonably conclude that an issuer adopting a policy generally prohibiting insider trading, but without disclosing how it prevents the unlawful communication of and trading on material nonpublic information, provides fewer such assurances to investors than an issuer that has developed and disclosed more particular and thorough policies and procedures. As noted in the Proposing Release, investors may find useful, to the extent it is included in the issuer's relevant policies and procedures, information on the issuer's process for analyzing whether directors, officers, employees, or the issuer itself when conducting an open-market share repurchase have material nonpublic information; the issuer's process for documenting such analyses and approving requests to purchase or sell its securities whether through Rule 10b5–1 plans or otherwise; and/or how the issuer enforces compliance with any such policies and procedures it may have. Investors may also use this information to assess the strengths and weaknesses of particular elements of these policies and procedures, which would help show how well the issuer protects its material nonpublic information from being misused in unlawful communications and securities trading, and how its protections compare with its competitors. Furthermore, the disclosure under Item 408 and Item 16J would address not only policies and procedures that apply to the purchase and sale of the registrant's securities, but also other dispositions of the registrant's securities where material nonpublic information could be misused, such as through gifts of such securities.[257]

In extending this disclosure requirement to FPIs, we are cognizant of the concerns raised by commenters, such as the concern that some issuers may already be subject to home-country governance disclosure and that additional disclosure may pressure an FPI to adopt additional measures not required by its home jurisdiction. To the extent that an FPI already discloses similar information under its home country rules, the additional burden imposed by the final rule may be minimal. As we have discussed, information about the efforts an issuer undertakes to prevent misuse of its material nonpublic information is likely to be important to investors, regardless of whether it is a domestic issuer or an FPI. Indeed, we are aware that one reason FPIs register in the United States is to provide greater transparency and

purchase, sale, and/or other dispositions of the registrant's securities by directors, officers and employees or the registrant itself, the language ''or the registrant itself'' was inadvertently omitted from the proposed regulatory text. *See* Proposing Release, *supra* note 22, at 8695, 8712, and 8728. We have corrected this omission in the final rules, which now include the language ''or the registrant itself.'' *See* Item 408(b)(1).

[251] *See supra* note 245.

[252] *See* Note 2 to General Instruction G(2) to Form 10–K.

[253] *See, e.g.,* letters from Davis Polk, Dow, and SIFMA 2 (all recommending that the final rule not require full disclosure of the policies and procedures within the body of the filing).

[254] *See supra* note 246.

[255] *See* 17 CFR 229.601(a)(2) and 17 CFR 232.102(d).

[256] *See* 17 CFR 232.105(b).

[257] The Exchange Act does not require that a ''sale'' of securities be for value, and instead provides that the ''terms 'sale' or 'sell' each include any contract to sell or otherwise dispose of.'' *Compare* Exchange Act Section 3(a)(14) [15 U.S.C. 78c(a)(14)], *with* Securities Act Section 2(a)(3) [15 U.S.C. 77b(a)(3)] (''[T]he terms 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value.''). For example, a donor of securities violates Section 10(b) if the donor gifts a security of an issuer in fraudulent breach of a duty of trust and confidence when the donor was aware of material nonpublic information about the security or issuer, and knew or was reckless in not knowing that the donee would sell the securities prior to the disclosure of such information. The affirmative defense under Rule 10b5–1(c)(1) is available for planned securities gifts.

assurances of the reliability of their disclosures to investors.

Finally, the disclosures that are required in Forms 10–K and 20–F discussed in this section as well as those discussed in Section II.B.1 will be subject to the certifications required by Section 302 of the Sarbanes-Oxley Act of 2002.[258] Section 302 requires an issuer's principal executive officer and principal financial officer to certify, among other things, that based on their knowledge, the Form 10–K or Form 20–F that they have signed does not contain untrue statements of material facts or omit to state material facts necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the periods covered by the reports.[259] In making these certifications, principal executive and principal financial officers attest to the accuracy of the statements in their Form 10–K or Form 20–F.[260] Thus, principal executive and principal financial officers may be liable under Rule 13a–14 if they certify as to a fact ''about which [they are] ignorant or which [they] know[ ] is false.'' [261]

3. Identification of Rule 10b5–1 and Non-Rule 10b5–1 Transactions on Forms 4 and 5

a. Proposed Amendments

Section 16(a) of the Exchange Act provides that every person who beneficially owns, directly or indirectly, more than 10 percent of any class of equity security (other than an exempted security) registered pursuant to Exchange Act Section 12, or who is an officer or director of the issuer of such security, shall file with the Commission an initial report disclosing the amount of all equity securities of such issuer of which the insider is the beneficial owner, and a subsequent transaction report to disclose any changes in beneficial ownership. Section 16 was designed to provide the public with information on securities transactions and holdings of corporate officers, directors, and principal shareholders, and to deter those individuals from seeking to profit from short-term trading in the securities of their corporations while in possession of material nonpublic information.[262]

Persons subject to Section 16 reporting must disclose changes in their beneficial ownership on Form 4 [263] or 5, [264] which are publicly available on EDGAR. In December 2020, the Commission proposed, among other things, amendments to Form 4 and Form 5 [265] to add a checkbox to these forms that would permit filers, at their option, to indicate whether a transaction reported on the form was made pursuant to a contract, instruction, or written trading plan for the purchase or sale of equity securities of the issuer that satisfies the conditions of Rule 10b5–1(c).[266] In response to this proposal, the Commission received feedback from several commenters who asserted, based on analyses of sales of securities executed under Rule 10b5–1 plans, that many of the surveyed transactions may have been made on the basis of material nonpublic information.[267] These commenters recommended that the proposed Rule 10b5–1 checkbox disclosure be mandatory on Forms 4 and 5 because such disclosure would help investors and the public better discern whether Rule 10b5–1 plans are being used to engage in opportunistic trading on the basis of material nonpublic information.[268]

In consideration of this feedback, the Commission proposed to add a Rule 10b5–1(c) checkbox as a mandatory disclosure requirement on Forms 4 and 5. A Form 4 or 5 filer would be required to indicate via the checkbox whether a transaction reported on that form was made pursuant to Rule 10b5–1(c). Filers would also be required to provide the date of adoption of the Rule 10b5–1 plan, and would have the option to provide additional relevant information about the reported transaction. Requiring this disclosure on Forms 4 and 5 would provide greater transparency around the use of Rule 10b5–1 plans and would be consistent with the primary purpose of Section 16.[269] It also would provide information that could be used by registrants to comply with their Item 408 disclosure obligations.

In addition, the Commission proposed to add a second, optional checkbox to both of Forms 4 and 5. This optional checkbox would allow a filer to indicate whether a transaction reported on the form was made pursuant to a pre-planned contract, instruction, or written plan for the purchase or sale of equity securities of the issuer that does not satisfy the conditions of Rule 10b5–1(c).

b. Comments on the Proposed Amendments

Most of the commenters who discussed this matter generally supported the proposal to add a mandatory checkbox on Forms 4 and 5 for the disclosure of trades under a Rule 10b5–1 trading arrangement.[270] For example, some of these commenters indicated that these checkboxes would provide useful information to investors and other market participants and may help prevent misuse of Rule 10b5–1 plans.[271] Another commenter, however, expressed the view that these checkboxes likely would not provide useful information if the Commission adopted the proposed cooling-off period.[272]

In addition, one of the commenters that generally supported the proposal did so subject to a recommended change. This commenter urged the Commission to amend the Rule 10b5–1 checkbox to state ''whether a transaction was intended to satisfy'' the Rule 10b5–1 affirmative defense rather than

[258] Public Law 107–204, 116 Stat. 745 (2002).

[259] In effectuating this statutory responsibility, the principal executive and financial officers of an issuer may be aided by a written representation (such as a sub–certification) from the issuer's principal legal or compliance officer (or person performing similar functions) that, based on a reasonable review, they have determined the issuer's insider trading practices and procedures comport with what the issuer is disclosing about them in its periodic reports. However, it would not be reasonable for a principal executive or financial officer to rely on such a representation if they are aware of information that is inconsistent with, or raises doubts about the reliability of, the representation.

[260] *See, e.g., SEC* v. *Jensen,* 835 F.3d 1100, 1112–13 (9th Cir. 2016); *see also GAF Corp.* v. *Milstein,* 453 F.2d 709, 720 (2d Cir. 1971) (''the obligation to file *truthful* statements implicit in the obligation to file'') ((emphasis in original)).

[261] *Id.* at 1113.

[262] *See Ownership Reports and Trading By Officers, Directors and Principal Security Holders,* Release No. 34–28869 (Feb. 8, 1991) [56 FR 7242 (Feb. 21, 1991)].

[263] A person subject to Section 16 must report specified changes in beneficial ownership on Form 4 before the end of the second business day following the date of execution of the transaction. *See* 17 CFR 240.16a–3(g).

[264] Form 5 is a year-end report to be used by a person subject to Section 16 to disclose certain transactions that were exempt from Section 16(b), and transactions and holdings that were required to be reported during the fiscal year, but were not. *See* 17 CFR 240.16a–3(f).

[265] Form 5 is a year-end report to be used by any person who was an officer, director or a 10% beneficial owner during any portion of the issuer's fiscal year to disclose transactions and holdings that are exempt from Section 16(b) or that were required to be reported during the fiscal year, but were not.

[266] *See Rule 144 Holding Period and Form 144 Filings,* Release No. 33–10911 (Dec. 22, 2020) [86 FR 5063 (Jan. 19, 2021)] (''December 2020 Proposing Release'').

[267] *See* letters from Council of Institutional Investors (dated Mar. 18, 2021), Alan Jagolinzer (dated Mar. 10, 2021), and David Larcker et al. (dated Mar. 10, 2021), available at *https://www.sec.gov/comments/s7-24-20/s72420.htm.*

[268] *Id.*

[269] *See* S. Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934).

[270] *See, e.g.,* letters from ACCO, CII, Cravath, and Quinn.

[271] *See* letters from CII and Quinn.

[272] *See* letter from Cravath.

whether a transaction ''was made'' pursuant to the affirmative defense.[273] This commenter was concerned that, for a number of reasons, it could be difficult for a reporting person to definitively affirm whether a transaction was in fact made pursuant to the Rule 10b5–1 affirmative defense. This commenter also stated that using ''intended to satisfy'' would be consistent with the Commission's approach in other proposed rules, such as proposed Item 703(c)(2)(iii) of Regulation S–K.[274]

A few commenters opposed the optional non-Rule 10b5–1 checkbox on Forms 4 and 5.[275] These commenters indicated that this checkbox would not provide any valuable information to investors, the Commission or other market participants because the details of such transactions are already provided in Forms 4 and 5.

c. Final Amendment

After considering these comments, we are adopting the mandatory Rule 10b5–1 checkboxes to Forms 4 and 5 as proposed with one modification. In response to the concerns expressed by a commenter that the proposed checkbox language would have required a filer to definitively state that the reported transaction was in fact made pursuant to the Rule 10b5–1 affirmative defense,[276] we have revised the text accompanying the checkboxes to state that a reported transaction is pursuant to a plan that is ''intended to satisfy the affirmative defense conditions'' of Rule 10b5–1(c).

This checkbox will help investors and the public better understand how trading plans that rely on the revised Rule 10b5–1(c) affirmative defense are being used by corporate insiders, including whether they are being used to engage in opportunistic trading. We disagree with the commenter who indicated that the checkbox would not provide useful information to investors in light of the cooling-off period that we are adopting for officers and directors. The checkbox provides transparency into the use of Rule 10b5–1 plans to help deter potential misuse of those plans, which would complement the cooling-off period. For example, the checkbox might be useful to investors in combination with disclosures regarding the adoption and termination of Rule 10b5–1 plans as it may help them to identify instances in which an officer or director may have opportunistically cancelled a trade or terminated a plan. Moreover, the potential effects of such a disclosure could discourage such opportunistic cancellations.

Finally, we are not adopting the optional checkbox that would allow a filer to indicate whether a transaction reported on the form was made pursuant to a non-Rule 10b5–1 trading arrangement. We are persuaded by commenters who stated that this checkbox would not provide investors and other market participants with useful information because the details of the transaction will already be disclosed in the form.

C. Disclosure Regarding Option Grants and Similar Equity Instruments Made Close in Time to the Release of Material Nonpublic Information

1. Proposed Amendments

Since the enactment of the Securities Act and the Exchange Act, the Commission has sought to enhance its rules regarding the disclosure of executive and director compensation and to improve the presentation of this information to investors.[277] One area of focus for the Commission has been disclosure related to equity-based compensation. Many companies use stock options as a form of compensation for their employees and executives.[278] In a simple stock option award, a company may grant an employee the right to purchase a specified number of shares of the company's stock at a specified price, called the exercise price, which is typically set as the fair market value of the company's stock on the grant date. Stock options with exercise prices at or above the fair market value of the underlying stock are designed to motivate the recipient to work to increase company value, because the option holder would only benefit if the company's stock price exceeds the exercise price at the time of exercise.[279] Alternatively, if a company is aware of material nonpublic information that is likely to decrease its stock price, it may decide to delay a planned option award until after the release of such information (a practice commonly referred to as ''bullet-dodging'').[280]

In 2006, the Commission revised its executive compensation disclosure rules to, among other things, provide investors with a more complete picture of compensation paid to principal executive officers, principal financial officers, and the other highest paid executive officers and directors.[281] In the 2006 Executive Compensation Release, the Commission stated that under the principles-based compensation disclosure requirements of Item 402 of Regulation S–K, registrants may be required to disclose in their Compensation Discussion and Analysis (''CD&A'') information about the timing of option grants in close proximity to the release of material nonpublic information by the company.[282] Such disclosure should include, for example, whether a company is aware of material nonpublic information that is likely to result in an increase of its stock price, such as a product development announcement or positive earnings, and grants stock options immediately before the release of this information. Timing option grants to occur immediately before the release of positive material nonpublic information (a practice commonly referred to as ''spring-loading'') can benefit executives with an option award that will likely be in-the-money as soon as the material nonpublic information is made public.[283]

In the 2006 Executive Compensation Release, the Commission noted that the existence of a program, plan, or practice to select option grant dates for executive officers in coordination with the release of material nonpublic information

[273] *See* letter from Sullivan.

[274] In a separate release, the Commission proposed amendments to Item 703(c)(2)(iii) of Regulation S–K to require disclosure of a plan that ''is intended to satisfy'' the conditions of Rule 10b5–1(c). *See Share Repurchase Disclosure Modernization,* Release No 34–93783 (Dec. 15, 2021) [87 FR 8443 (Feb. 1, 2022)] (proposing amendments to modernize and improve disclosures about repurchases of an issuer's equity securities that are registered under the Exchange Act).

[275] *See, e.g.,* letters from Cravath and Cleary.

[276] *See* letter from Sullivan.

[277] *See, e.g., Executive Compensation and Related Person Disclosure,* Release No. 33–8732A (Aug. 29, 2006) [71 FR 53158 (Sept. 8, 2006)] (hereinafter ''2006 Executive Compensation Release'') at 53160 at n. 45; *Proxy Disclosure Enhancements,* Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334 (Dec. 24, 2009)].

[278] The term ''option'' includes stock options, SARs and similar instruments with option-like features. *See* 17 CFR 229.402(a)(6).

[279] When the exercise price for an option is less than the fair market value of the underlying security, the option is ''in the money.'' If the exercise price and fair market value are the same, the option is ''at the money.'' If the exercise price is greater than the fair market value, the option is ''out of the money.''

[280] *See* Allan Horwich, *The Legality of Opportunistically Timing Public Company Disclosures in the Context of SEC Rule 10b5–1,* 71 Bus. Law. 1113, 1143 (2016) (noting that ''bullet-dodging'' occurs when a board delays the grant of an option until adverse material nonpublic information known to the board is disclosed, which reduces the market price and the option exercise price that is set at the time of the grant).

[281] 2006 Executive Compensation Release, *supra* note 277.

[282] *See* 17 CFR 229.402(b)(2)(iv) and 2006 Executive Compensation Release, *supra* note 277, at 53163–4.

[283] *See* Lucian A. Bebchuk & Jesse M. Fried, *Paying for Long-Term Performance,* 158 U. Pa. L. Rev. 1915, 1937–39 & n. 63 (2010) (noting that the practice of spring-loading may also disguise an in-the-money option award as having been granted at-the-money).

would be material to investors and should be fully disclosed.[284]

In the Proposing Release, the Commission expressed concern that our existing disclosure requirements do not provide investors with adequate information regarding an issuer's policies and practices on stock option awards timed to precede or follow the release of material nonpublic information. The Commission noted that, under the current executive compensation disclosure rules, compensation-related equity interests (including options, restricted stock, and similar grants) are required to be presented in a tabular format and accompanied by appropriate narrative disclosure necessary for an understanding of the information presented in a table. Option grants that are spring-loaded or bullet-dodging are not required to be separately identified in these tables. Investors therefore may not have a clear picture of the effect of an option award that is made close in time to the release of material nonpublic information on the executives' or directors' compensation and on the company's financial statements. Understanding that issuers may have reasons for granting these types of options, but that increased transparency may be warranted, the Commission proposed amendments that would require registrants to disclose in a new table any option awards to a ''named executive officer'' [285] (''NEO'') or director that is made close in time to the release of material nonpublic information such as an earnings announcement.

Specifically, to identify if any such timed options are granted, the Commission proposed adding a new paragraph to Item 402 of Regulation S–K that would require: (1) tabular disclosure of each award of stock options, SARs, or similar option-like instruments (*i.e.* the grant date, number of securities underlying the award, the exercise price of the award, and the grant date fair value of the award) granted within 14 calendar days before or after the filing of a periodic report, an issuer share repurchase, or the filing or furnishing of a current report on Form 8–K that discloses material nonpublic information (including earnings information); (2) the market value of the underlying securities the trading day before disclosure of the material nonpublic information; and (3) the market value of the underlying securities one trading day after disclosure of material nonpublic information.

The proposed 14-day window was designed to cover the period that an issuer would be aware of material nonpublic information at the time that its board of directors grants these awards. The Commission noted that many issuers also voluntarily communicate material nonpublic information regarding their results of operations or financial condition for a completed fiscal quarter or annual period through an earnings release.[286] After completion of a fiscal quarter, a company's board of directors will usually meet a week or two before the earnings release.[287] During this period, the board would likely be aware of material nonpublic information that could affect the price of the company's stock.

To further address these concerns, the Commission also proposed to require narrative disclosure about an issuer's policies and practices regarding the timing of grants of these awards in relation to the disclosure of material nonpublic information by the issuer, including how the board determines when to grant such awards and whether, and if so, how, the board or compensation committee takes material nonpublic information into account when determining the timing and terms of an award; and whether the issuer has timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation. For issuers that are subject to the CD&A, the proposed narrative disclosure could be included in the CD&A.

Overall, the Commission intended the proposed amendments to provide shareholders with a full and complete picture of any spring-loaded or bullet-dodging option grants during the fiscal year. The Commission found it important for shareholders to understand company practices with respect to these types of grants as they consider their say-on-pay votes, and director elections. Accordingly, the Commission proposed to require this disclosure in annual reports on Form 10–K, [288] as well as in proxy statements and information statements related to the election of directors, shareholder approval of new compensation plans, and solicitations of advisory votes to approve executive compensation.[289]

Under the proposal, SRCs and emerging growth companies (''EGCs'') [290] would be subject to the new disclosure requirement. However, consistent with the scaled approach to their executive compensation disclosure, [291] they would be permitted to limit their disclosures about specific option awards to the PEO, the two most highly compensated executive officers other than the PEO at fiscal year-end, and up to two additional individuals who would have been the most highly compensated but for not serving as executive officers at fiscal year-end.[292]

2. Comments on the Proposed Amendments

Many commenters supported the proposed tabular and narrative disclosures.[293] Some of these commenters generally indicated that the proposed disclosures would increase investor confidence and might deter or discourage the use of spring-loaded and bullet-dodging option grants.[294] For example, they agreed that these disclosures would help investors make informed choices when voting on director elections and on executive pay and other compensation matters.

[284] 2006 Executive Compensation Release, *supra* note 277, at 53163.

[285] Named executive officers include all individuals serving as the registrant's Principal Executive Officer (''PEO'') or Principal Financial Officer (''PFO'') during the last completed fiscal year, the registrant's three most highly compensated officers other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year, and up to two additional individuals for whom disclosure would have been provided but for the fact that the individual was not serving as an executive officer at fiscal year-end. *See* Item 402(a)(3) of Regulation S–K.

[286] The staff estimates that approximately 63% of the Form 10-Qs filed with the Commission in calendar year 2017 were accompanied by a prior or concurrent earnings release by the issuer.

[287] While some companies provide earnings releases in advance of the corresponding Form 10–Q filings, many companies also issue earnings releases concurrently with their Form 10–Q filings.

[288] The executive compensation disclosure requirements in Part III of Form 10–K may be incorporated by reference from a proxy or information statement involving the election of directors, if filed within 120 days of the end of the fiscal year. *See* Note 3 to General Instruction G(3) to Form 10–K.

[289] Exchange Act Rule 14a–21 [17 CFR 240.14a–21] requires, among other things, that companies soliciting proxies for an annual or other meeting of shareholders at which directors will be elected include a separate resolution subject to a shareholder advisory vote to approve the compensation of named executive officers.

[290] An EGC is defined as a company that has total annual gross revenues of less than $1.235 billion during its most recently completed fiscal year and, as of Dec. 8, 2011, had not sold common equity securities under a registration statement. A company continues to be an EGC for the first five fiscal years after it completes an IPO, unless one of the following occurs: Its total annual gross revenues are $1.235 billion or more; it has issued more than $1 billion in non-convertible debt in the past three years; or it becomes a ''large accelerated filer,'' as defined in Exchange Act Rule 12b–2. *See* Securities Act Rule 405; Exchange Act Rule 12b–2.

[291] *See* Item 402(*l*) of Regulation S–K.

[292] *See* Item 402(m)(2) of Regulation S–K.

[293] *See, e.g.,* letters from ACCO, AFL–CIO, ICGN, NASAA, O'Reilly, and Public Citizen.

[294] *See, e.g.,* letters from ICGN and NASAA.

Commenters also expressed the view that the proposed disclosures would improve investor confidence by indicating that such awards are appropriately tied to long-term performance targets [295] and, similarly, giving insight into practices that could appear similar to insider trading, which would undermine the perceived fairness and integrity of the markets.[296]

A number of commenters, however, did not support this proposal.[297] Many of these commenters contended that the proposed disclosure requirements were unnecessary because the information is already available to the public through current executive compensation disclosure requirements and Section 16 reports, such as Form 4.[298] Several commenters contended that the proposed disclosures could be misleading as they could suggest a causal link between these awards and the release of material nonpublic information where none exists.[299]

In particular, many commenters were opposed to the proposed tabular disclosure of each option award granted within 14-calendar days before or after a triggering event.[300] Several commenters contended that the proposed disclosure would capture a large number of ordinary-course equity award grants and would not help investors distinguish spring-loaded or bullet-dodging grants from routine option grants.[301] Some of these commenters asserted that the timing of equity award grants is typically based on a meeting schedule for directors that is established several months in advance without consideration of disclosure of material information.[302]

A few commenters that opposed the tabular disclosure suggested modifying the requirements if adopted, to better ensure that the disclosure does not unduly encompass routine awards. A few commenters suggested shortening the disclosure window from 14 days,[303] to a shorter period, such as to three or five days.[304] Other commenters recommended that the Commission narrow the triggering events for this disclosure. Some of these commenters suggested that the Commission remove the Form 8–K disclosure trigger or limit it to Forms 8–K reporting an event under Item 1.01 [305] or Item 2.02 [306] of the form rather than using a materiality standard.[307] These commenters argued, among other things, that these reports are more likely to impact the price or trading in an issuer's securities [308] and that a more bright-line approach would benefit investors by providing them with more consistent and material information while removing the potential burden on issuers that making a materiality assessment for each Form 8–K may impose.[309] One of these commenters also urged the Commission to remove the share repurchase trigger or change it to trigger disclosure upon the adoption or announcement of a new share repurchase program, rather than any share repurchase transaction.[310] This commenter asserted that the proposed requirement could pose a substantial burden on issuers without any potential benefit to investors as many issuers engage in share repurchases activity regularly and, in some instances, daily.

In addition, another commenter asserted that the proposed narrative disclosure sufficiently addressed the Commission's concerns regarding spring-loading and bullet-dodging.[311] This commenter expressed the view that disclosure regarding the compensation committee's consideration of whether the issuer has material nonpublic information at the time of the grant and how the compensation committee considers the impact of timing and nature of corporate disclosures, share buyback announcements, and similar events would sufficiently address the concerns.

Finally, a few commenters contended that these rules are unnecessary because the staff guidance of Staff Accounting Bulletin 120 [312] mitigates disclosure concerns regarding spring-loaded options.[313]

3. Final Amendments

Having considered the comments received, we are adopting Item 402(x) as proposed with respect to the narrative disclosure and with several modifications to the tabular disclosure.

With respect to the narrative disclosure, as proposed, the final rule will require registrants to discuss the registrant's policies and practices on the timing of awards of stock options, SARs and/or similar option-like instruments in relation to the disclosure of material nonpublic information by the registrant, including how the board determines when to grant such awards (for example, whether such awards are granted on a predetermined schedule); whether, and if so, how, the board or compensation committee takes material nonpublic information into account when determining the timing and terms of an award, and whether the registrant has timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation.[314]

We disagree with commenters who suggested this narrative disclosure would not provide useful information to investors. While it is true that investors can with some effort identify the timing both of awards and earnings announcements, this information would not reveal the extent to which a board considered the effects of such timing on its executive compensation practices, and may have modified other aspects of the executive's total compensation to reflect any impact that the timing of the award may have had. For similar reasons, we do not agree that the staff guidance in SAB 120 sufficiently mitigates disclosure concerns regarding

[295] *See* letter from ICGN.

[296] *See* letter from NASAA.

[297] *See, e.g.,* letters from ABA, Chevron, Cleary, Cravath, Davis Polk, DLA, Dow, Home Depot, FedEx, Fenwick, Jones Day, MD Bar, NAM, Paul Weiss, Quest, SCG, Shearman, Sullivan, and Wilson Sonsini.

[298] *See, e.g.,* letters from Cleary, Cravath, Dow, Fenwick, Home Depot, SCG, Shearman, and Wilson Sonsini.

[299] *See, e.g.,* letters from Dow, FedEx, Home Depot, PNC.

[300] *See, e.g.,* letters from ABA, Davis Polk Cleary, Cravath, Dow, Fenwick, Home Depot, SCG, and Shearman.

[301] *See, e.g.,* letters from Cleary, Cravath, Dow, Fenwick, Home Depot, SCG, Shearman, and Wilson Sonsini.

[302] *See, e.g.,* letters from Cleary, Cravath, Dow, FedEx, Home Depot, and SCG.

[303] *See, e.g.,* letters from Cravath and Davis Polk.

[304] *See* letter from Cravath.

[305] Item 1.01 requires disclosure of the entry into a material definitive agreement by the registrant.

[306] Item 2.02 requires disclosure of, among other things, a public announcement or release (including any update of an earlier announcement or release) disclosing material nonpublic information regarding the registrant's results of operations or financial condition for a completed quarterly or annual fiscal period.

[307] *See, e.g.,* letters from Fenwick and Sullivan.

[308] *See* letter from Fenwick.

[309] *See* letter from Sullivan.

[310] *Id.*

[311] *See* letter from Dow.

[312] *See Staff Accounting Bulletin No. 120,* Release No. SAB 120 (Nov. 24, 2021) [86 FR 68111 (Dec. 1, 2021)] (''SAB 120''). In SAB 120, among other topics, the staff provided interpretative guidance for public companies to consider regarding the accounting treatment of option awards made when the company possessed material nonpublic information. All staff statements, including SAB 120 and any other staff statement cited in this release, represent the views of the staff. They are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved their content. These staff statements, like all staff statements, have no legal force or effect: they do not alter or amend applicable law, and they create no new or additional obligations for any person.

[313] *See, e.g.,* letters from SCG, Cravath, and Jones Day.

[314] Item 402(x)(1) does not require a registrant to adopt policies and practices on the timing of awards of stock options, SARs and/or similar option-like instruments if it has not already done so, or to modify any such existing policies.

the timing of options and similar awards as contended by some commenters. To the contrary, the narrative disclosures required by the final rule will increase the mix of information available to investors and better inform them of the appropriateness of any adjustments made by the board.

In addition, we are adopting the tabular disclosure requirement with several modifications in light of comments received. To address concerns that this disclosure may be misleading or otherwise overly broad, we have narrowed the disclosure window, with the result that disclosure would be required for awards made in the four business days before the filing of a periodic report or the filing or furnishing of a current report on Form 8–K that discloses material nonpublic information (including earnings information) and ending one business day after a triggering event. We have also removed the share repurchase disclosure trigger. In addition, the final rule provides that a Form 8–K reporting only the grant of a material new option award under Item 5.02(e) does not trigger this disclosure. We also combined the last two columns of the proposed table that would have required disclosure of the market value of the securities underlying the award one trading day before and one trading day after disclosure of material nonpublic information into a single column that discloses the percentage change in the market value of the securities underlying the award between those dates.

The final rules provide that, if, during the last completed fiscal year, stock options, SARs, and/or similar option-like instruments were awarded to an NEO within a period starting four business days before the filing of a periodic report on Form 10–Q or Form 10–K, or the filing or furnishing of a current report on Form 8–K that discloses material nonpublic information (including earnings information), other than a current report on Form 8–K disclosing a material new option award grant under Item 5.02(e), and ending one business day after a triggering event, the issuer must provide the following information concerning each such award for the NEO on an aggregated basis in the tabular format set forth in the rule:

- The name of the NEO;
- The grant date of the award;
- The number of securities underlying the award;
- The per-share exercise price;
- The grant date fair value of each award computed using the same methodology as used for the registrant's financial statements under generally accepted accounting principles; and
- The percentage change in the market price of the underlying securities between the closing market price of the security one trading day prior to and one trading day following the disclosure of material nonpublic information.

The purpose of the new table is to highlight for investors options award grants that may be more likely than most to have been made at a time that the board of directors was aware of material nonpublic information affecting the value of the award.

In a modification from the proposing release, we are requiring that the table include only option awards granted in the period beginning four business days preceding a triggering event and ending one business day after a triggering event. We agree with commenters that the proposed 14-day disclosure window may result in disclosure of many routine awards that are less likely to have been affected by material nonpublic information. To address these concerns, similar to the recommendation of one of those commenters to shorten the timeframe to three or five days,[315] we selected a four-business day period preceding a triggering event because a registrant must generally file a Form 8–K within that period of time upon becoming aware of a triggering event. It therefore is less likely that the registrant would be able to grant an award based upon the board's awareness of a triggering event more than four business days before the filing of a corresponding Form 8–K. We are adopting the same time period for awards preceding disclosures on Forms 10–Q and 10–K to make such disclosures readily comparable to those triggered by an 8–K filing. In addition, we are requiring disclosure of options awards in the one-business day period after the filing or furnishing of Forms 8–K, 10–Q, or 10–K because in some circumstances the issuer's share price will not fully reflect the information disclosed immediately after disclosure.[316] Including post-filing option awards beyond that period might reduce the value of the information in the table by including awards that may be less likely to be affected by material nonpublic information.

In addition, to further ensure that this disclosure covers the types of grants that we are concerned with, we have removed the share repurchase triggering event and provided a limited exception from the tabular disclosure of option awards based on the filing or furnishing of a Form 8–K. We are persuaded by commenters that including awards close in time to any issuer share repurchases could result in disclosure of virtually every award, greatly reducing the information value of the table. With respect to the Form 8–K trigger, we have created an exception for Item 5.02(e) Forms 8–K that only disclose a material new option award grant because we believe including this particular information in the new table would be redundant and not informative to investors. We disagree, however, with the commenters that recommended removing the Form 8–K trigger or limiting it to Item 1.01 or Item 2.02 Forms 8–K because a broad range of Forms 8–K could disclose material information that raises spring-loading concerns, not just these types of Forms 8–K. For example, the disclosure of an event under Item 8.01 of Form 8–K, such as the status of a patent application, may constitute material information that could affect the value of an option award.

Lastly, we combined the final two columns of the proposed table into a single column that requires disclosure of the percentage change in the market value of the securities underlying the award between the closing market price of the securities one trading prior to the disclosure of material nonpublic information and one trading day following the disclosure of material nonpublic information. This change is intended to make it easier for investors to understand the impact that spring-loading may have on the potential value realizable by the NEO.

D. Structured Data Requirements

1. Proposed Amendments

The Commission proposed to require registrants to tag the information specified by proposed Items 408 and 402(x) of Regulation S–K, and Item 16J of Form 20–F in Inline XBRL in accordance with Rule 405 of Regulation S–T and the EDGAR Filer Manual.[317] The proposed requirements would include block text tagging of narrative disclosures, as well as detail tagging of quantitative amounts disclosed within

[315] *See* letter from Cravath.

[316] *See infra* Section V.D.

[317] This tagging requirement would be implemented by including cross-references to Rule 405 in proposed Item 408(a)(3), Item 408(b)(3) and Item 402(x), and Item 16J of Form 20–F, and by revising Rule 405(b) to include the Item 408(a), 408(b)(1), and Item 402(x) disclosure. In conjunction with the EDGAR Filer Manual, Regulation S–T governs the electronic submission of documents filed with the Commission. Rule 405 specifically governs the scope and manner of disclosure tagging requirements for operating companies and investment companies, including the requirement in Rule 405(a)(3) to use Inline XBRL as the specific structured data language for tagging the disclosures.

the narrative disclosures. Inline XBRL is both machine-readable and human-readable, which improves the quality and usability of XBRL data for investors.[318]

2. Comments on the Proposed Amendments

Most of the commenters who addressed this proposal supported requiring the tagging of the disclosures.[319] One commenter, however, opposed this proposal and urged the Commission not to adopt it.[320] This commenter asserted that XBRL tagging was not well adapted to the disclosure of trading policies and procedures that would be required under proposed Item 408 and proposed Item 16J of Form 20–F, and that the full impact of this requirement would depend on what tagging would be required, which was not included with the Proposing Release.

3. Final Amendments

After considering these comments, we are adopting the amendments as proposed. The final amendments will require registrants to tag the information specified by new Items 402(x), 408(a), and 408(b)(1) of Regulation S–K, and new Item 16J(a) of Form 20–F, in Inline XBRL in accordance with Rule 405 and the EDGAR Filer Manual. We do not agree with a commenter's contention that XBRL tagging is not well adapted to these disclosures.[321] Rather, XBRL tagging is well adapted to narrative disclosures such as those specified by new Items 408(a), 408(b)(1), and 402(x)(1) of Regulation S–K and new Item 16J(a) of Form 20–F. In that regard, we note that the Commission has required XBRL tagging for narrative disclosures, such as descriptions of significant accounting policies in footnotes to financial statements since the initial implementation of XBRL requirements in 2009.[322] Requiring Inline XBRL tagging of these disclosures will benefit investors by making the disclosures more readily available and easily accessible to investors, market participants, and others for aggregation, comparison, filtering, and other analysis, as compared to requiring a non-machine readable data language such as HTML. Registrants must comply with the Inline XBRL tagging requirements in Forms 10–Q, 10–K and 20–F, and any proxy or information statements that are required to include the Item 408 and/or Item 402(x) disclosures, beginning with the first such filing that covers the first full fiscal period beginning on or after April 1, 2023, for companies other than SRCs. SRCs will be required to provide and tag the disclosures after an additional six-month transition period. This compliance date is intended to provide sufficient time for filers, filing agents, and software vendors to transition to the new requirements, as well as to provide time for any necessary taxonomy or EDGAR changes.

This Inline XBRL tagging will enable automated extraction and analysis of the granular data required by the final rules, allowing investors and other market participants to more efficiently perform large-scale analysis and comparison of this information across registrants and time periods. For example, an Inline XBRL requirement will allow investors to extract and search for disclosures about the use of Rule 10b5–1 plans by directors and officers reported in a registrant's periodic reports rather than having to manually run searches for these disclosures through entire documents. The Inline XBRL requirement would also enable automatic comparison of tagged disclosures against prior periods. At the same time, we do not expect the incremental compliance burden associated with tagging the information specified by new Items 402(x), 408(a), 408(b)(1), or new Item 16J(a) will be unduly burdensome because registrants subject to the tagging requirements are for the most part subject to similar Inline XBRL requirements in other Commission filings.

E. Reporting of Gifts on Form 4

1. Proposed Amendments

Currently, Section 16 reporting persons may report any ''bona fide gift'' [323] of equity securities registered under Exchange Act Section 12 on Form 5. Exchange Act Rule 16a–3(f) permits officers, directors and ten percent holders to report on Form 5 within 45 days after the issuer's fiscal year end certain transactions during the most recent fiscal year that were exempt from Section 16(b).[324] As transactions that are exempted from Section 16(b) by Rule 16b–5,[325] both the acquisition and disposition of bona fide gifts are eligible for delayed reporting on Form 5 pursuant to Rule 16a–3(f)(1). This filing schedule, under the current rules, can permit Section 16 reporting persons to report ''bona fide'' gifts more than one year after the date of the gift.[326]

In the Proposing Release, the Commission noted that the delayed reporting of gifts on Form 5 may allow Section 16 reporting persons to engage in problematic practices involving gifts of equity securities, such as making stock gifts while in possession of material nonpublic information,[327] or backdating stock gifts in order to maximize the tax benefits associated with such gifts.[328] To address these concerns, the Commission proposed to amend Exchange Act Rule 16a–3 to require the reporting of dispositions by bona fide gifts of equity securities on Form 4. Under the proposal, an officer, director, or a beneficial owner of more than 10 percent of the issuer's registered equity securities who makes a gift of equity securities would be required to report the gift on Form 4, which has a deadline of the end of the second business day following the date of execution of the transaction. This deadline would be significantly earlier than what is required under Form 5. The earlier reporting deadline is intended to help investors, other market participants, and the Commission better evaluate the actions of these Section 16 reporting persons and the context in which equity securities gifts are being made.

2. Comments on the Proposed Amendments

Several commenters generally supported the proposal to require Section 16 reporting persons to report dispositions of equity securities by bona

[318] *See Inline XBRL Filing of Tagged Data,* Securities Act Release No. 10514 (June 28, 2018) [83 FR 40846 (Aug. 16, 2018)]. Inline XBRL allows filers to embed XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate XBRL exhibit. Inline XBRL is both human-readable and machine-readable for purposes of validation, aggregation, and analysis. *Id.* at 40851.

[319] *See, e.g.,* letters from CII, AFL–CIO, ICGN, and XBRL US, Inc. (''XBRL–US'').

[320] *See* letter from Cleary.

[321] *Id.*

[322] *See* 17 CFR 232.405(d).

[323] A bona fide gift is a gift that is not required or inspired by any legal duty or that is in any sense a payment to settle a debt or other obligation, and is not made with the thought of reward for past services or hope for future consideration. *See Ownership Reports and Trading by Officers, Directors and Principal Stockholders,* Release No. 34–26333 (Dec. 2, 1988) [53 FR 49997 (Dec. 13, 1988)].

[324] 17 CFR 240.16a–3(f).

[325] 17 CFR 240.16b–5.

[326] Reports on Form 5 are due within 45 days after the issuer's fiscal year end, which potentially allows a delay of up to 410 days between a reportable transaction and the filing of the Form 5.

[327] *See* Daisy Maxey, *Improper 'Insider Charitable Giving' Is Widespread, Study Says,* Wall St. J. (July 5, 2021) (retrieved from Factiva database).

[328] *See* S. Burcu Avci et al., *Insider Giving,* 71 Duke L.J. 619–700 (2021) (finding that insiders' charitable gifts of securities are unusually well timed suggesting that such results are likely due to the possession of material nonpublic information and from the backdating of the stock gift). *See also* David Yermack, *Deductio ad Absurdum: CEOs Donating Their Own Stock to Their Family Foundations,* 94 J. Fin. Econ. 107 (2009).

fide gifts on Form 4.[329] One of these commenters agreed with the reasons cited in the Proposing Release that the earlier reporting deadline would help investors, other market participants, and the Commission better evaluate the actions of these Section 16 reporting persons and the context in which these gifts are made.[330]

A number of commenters, however, expressed concern over the reporting of dispositions by bona fide gifts of equity securities on Form 4, and in particular expressed concern about the proposed reporting two-day deadline, including the resulting compliance and administrative burdens.[331] Some of these commenters contended that certain estate planning transactions involving gifts of equity securities are complex and that Section 16 reporting persons will spend substantial time analyzing these transactions to ensure proper reporting under Section 16.[332] One commenter contended that the proposed amendment could discourage Section 16 reporting persons from making gifts of equity securities and, as a result, urged the Commission to not adopt this proposal, or, at a minimum, limit it to bona fide gifts of securities made to charities affiliated with the insider and to extend the reporting deadline for bona fide gifts of securities, such as to 45 days.[333] Another commenter suggested that a donor should be able to avoid insider trading liability by obtaining a commitment from the charitable donee not to sell the donated stock until after any material nonpublic information known by the donor at the time of the donation has become public or stale.[334] This commenter also argued that the proposed amendment was overbroad in that it applied to some gifts, such as in case of transfers to a trust controlled by the donor, that the commenter asserted were not ''problematic.'' [335]

Finally, this same commenter also expressed concern that language in the proposing release purporting to illustrate the application of Section 10(b) to gifts of securities appeared to represent an extension or modification of insider trading law.[336] In footnote 55 of the Proposing Release, the Commission stated that ''a donor of securities violates Section 10(b) if the donor gifts a security of an issuer in fraudulent breach of a duty of trust and confidence when the donor was aware of material nonpublic information about the security or issuer, and knew or was reckless in not knowing that the donee would sell the securities prior to the disclosure of such information.'' [337] This commenter noted that shareholders often make charitable donations of stock at the end of the year to obtain an income-tax deduction for the current year, and that the charitable organization that receives the stock often sells the securities upon receipt. This commenter asserted the Commission should clearly explain the basis for its conclusion and provide guidance as to how a Section 16 reporting person could make a charitable donation of securities without running afoul of Section 10(b) and Rule 10b–5. The commenter expressed concern that the Commission's position would criminalize this type of gifting.

3. Final Amendments

After considering the comments, we are adopting the amendments to Rule 16a–3 as proposed. Under the final amendments, Section 16 reporting persons will be required to report dispositions of bona fide gifts of equity securities on Form 4 (rather than Form 5) in accordance with Form 4's filing deadline (that is, before the end of the second business day following the date of execution of the transaction). To address our concerns that the lengthy reporting deadline may allow Section 16 reporting persons to engage in the problematic practices noted above, we intend for this reporting deadline to help investors, other market participants, and the Commission better evaluate the actions of Section 16 filers and the context in which they make gifts of equity securities. In that regard, we agree with the academic authors, cited in the Proposing Release,[338] who observe that a gift followed closely by a sale, under conditions where the value at the time of donation and sale affects the tax or other benefits obtained by the donor, may raise the same policy concerns as more common forms of insider trading.[339] As these academic authors have found, because the donor is in a position to benefit from the asset's value at the time of donation and sale, the donor may be motivated to give at a time when donor is aware of material nonpublic information and may expect the donee to sell prior to the disclosure of such information.[340] Investors cognizant of this dynamic may be more reluctant to trade. We also agree with the academic authors that a gift made with the knowledge that the donee will soon sell can be seen as in effect a sale for cash followed by gift of the cash.[341]

We are clarifying here, however, that the affirmative defense of Rule 10b5–1(c)(1) is available for any bona fide gift of securities, including a gift that might otherwise cause the donor to be subject to liability under Section 10(b), because when making the gift the donor was aware of material nonpublic information about the security or issuer and knew or was reckless in not knowing that the donee would sell the securities prior to the disclosure of such information.[342] In our view, the terms ''trade'' and ''sale'' in Rule 10b5–1(c)(1) include bona fide gifts of securities.[343] For example, a covered individual may enter into a binding arrangement instructing their attorney or tax advisor to gift shares to a charitable organization, with the amount of shares gifted determined according to a traditional algorithm or formula, or instead according to some tax objective, such as the amount of shares that would maximize the

[329] *See, e.g.,* letters from AFL–CIO, Cravath, and ICGN.

[330] *See* letter from ICGN.

[331] *See, e.g.,* letters from HRPA, Davis Polk, and NAM.

[332] *See, e.g.,* letters from HRPA and Davis Polk.

[333] *See* letter from HRPA; *see also* letter from NAM (expressing concern that the ''tight timeframe'' in the proposal will be ''functionally unworkable'' and urging that the Commission consider a reporting deadline longer than two days).

[334] *See* letter from Davis Polk.

[335] *See id; see also* letter from HRPA (asserting that the proposed amendment could ''unnecessarily complicate estate planning activities that have a very low likelihood of abuse'').

[336] *See* letter from Davis Polk (citing footnote 55 of the Proposing Release).

[337] *See* Proposing Release at 8695.

[338] *See* Section II.D. of the Proposing Release.

[339] *See supra* note 328.

[340] We disagree with the commenter who argued that donors are not motivated by financial advantage and that tax considerations do not warrant treating gifts ''as if they were market transactions.'' *See* letter from HRPA. Although we agree that many gifts are likely driven by other than pecuniary motives, the tax treatment of any particular gift can substantially affect the net cost of that donation. Extensive academic literature documents that such differences affect the amount and timing of gifts. *See, e.g.,* James A. Andreoni & A. Abigail Payne, *Charitable Giving,* in 5 Handbook of Public Economics 1 (Alan J. Auerbach et al. eds., 2013). To be clear, we understand that in the common case of charitable donations of stock to a public charity, the value of the donor's tax benefit is (subject to some limitations) the value of the asset on the date of donation, not the value obtained by the recipient upon sale. *See* 26 U.S.C. 170(e); 26 CFR 1.170A–1(c)(1). But, when a sale occurs close in time to the time of donation, these two may be the same. In addition, we note that non-pecuniary motives can also lead donors to consider the value a donee realizes upon sale, as in the case where the donor wishes to maximize the amount of cash available to the gift recipient.

[341] *See* Avci et al *supra* note 328, at 650–52.

[342] We are aware that some covered individuals currently make bona fide gifts under a Rule 10b5–1 plan. *See* letter from Sullivan. In clarifying that the affirmative defense of Rule 10b5–1(c)(1) is available for bona fide gifts of securities, we do not intend to suggest that this defense was previously unavailable for such transactions.

[343] *See supra* note 257.

individual's annual charitable contribution deduction.

We are not persuaded by the concerns of commenters who suggested that we not adopt this proposal, or that we adopt a separate reporting deadline for bona fide gifts of securities that is much longer than the existing Form 4 deadline. As noted in Section V below, we recognize that this amendment may increase compliance costs and may do so to a greater extent for estate planning transactions given their complexity.[344] Any such increases, however, should be limited as the majority of insiders already report these gifts on Form 4. Further, while we acknowledge that the amendment may make year-end tax planning incrementally more difficult as filers must delegate analysis of or anticipate their year-end tax needs three or four months earlier, our clarification that bona fide gifts are eligible for the Rule 10b5–1(c)(1) affirmative defense should mitigate any adverse consequences that commenters suggested, such as discouraging bona fide gifts. We also are not convinced that a shorter reporting period will substantially affect estate planning transactions, which generally are carefully planned and analyzed in advance and adopted under the advice of tax counsel who may assist in any needed analysis.

Further, we disagree with the commenter who suggested that we narrow the scope of the gift limitations, such as by applying it only to gifts made to charities affiliated with the Section 16 reporting person or exempting donors who obtain a commitment from the charitable donee not to sell the donated stock until after any material nonpublic information known by the donor at the time of the donation has become public or stale.[345] While, in some cases, a close affiliation between the donor and donee can make an abusive transaction easier to carry out, none of the potential concerns we have identified are limited to transfers to entities controlled by or affiliated with the donor. In addition, the commenter argued that donated stock would not implicate any insider trading concerns if the donor obtained commitments that the stock would not be sold until any material nonpublic information became public or stale. We doubt any such approach would be effective in maintaining investor confidence because it may be difficult or impossible to verify whether the donor had obtained a binding commitment to refrain from such a sale. Moreover, this commenter appears to urge us to adopt an exception for gifts to estate planning vehicles controlled by the donor, because the commenter believes that such transfers would not permit the practices described in the Proposing Release. There may be circumstances, however, under which it would be advantageous for the donor if the donee entity obtains a high sales price shortly after the donation, such as where the entity allows the donor to take advantage of tax-favorable diversification opportunities. As we see no practical way to identify which gifts pose this risk and which do not, we are not adopting such an exception.[346]

III. Transition Matters

A number of commenters recommended that the Commission provide transition guidance or a phase-in period, such as a 12-month phase-in, for the proposed disclosure amendments. In response, we are providing the following compliance dates for the final amendments:

- Section 16 reporting persons will be required to comply with the amendments to Forms 4 and 5 for beneficial ownership reports filed on or after April 1, 2023; and
- Issuers that are SRCs will be required to comply with the new disclosure and tagging requirements in Exchange Act periodic reports on Forms 10–Q, 10–K and 20–F and in any proxy or information statements that are required to include the Item 408, Item 402(x), and/or Item 16J disclosures in the first filing that covers the first full fiscal period that begins on or after October 1, 2023.
- All other issuers will be required to comply with the new disclosure and tagging requirements in Exchange Act periodic reports on Forms 10–Q, 10–K and 20–F and in any proxy or information statements that are required to include the Item 408, Item 402(x), and/or Item 16J disclosures in the first filing that covers the first full fiscal period that begins on or after April 1, 2023.

While we acknowledge that several commenters requested a longer phase-in period for these amendments, we believe that these compliance dates strike an appropriate balance between affording issuers and Section 16 reporting persons time to prepare to comply with the new rules and ensuring that this information becomes available to investors in a timely manner. For example, Section 16 reporting persons should have the information needed to comply with the amendments to Forms 4 and 5 readily available.

In addition, some commenters requested that we clarify the application of the amendments to Rule 10b5–1(c)(1) to existing Rule 10b5–1 plans and/or provide transitional relief for existing plans.[347] The amendments to Rule 10b5–1(c)(1) would not affect the affirmative defense available under an existing Rule 10b5–1 plan that was entered into prior to the revised rule's effective date, except to the extent that such a plan is modified or changed in the manner described in Rule 10b5–1(c)(iv)[348] after the effective date of the final rules. In that case, the modification or change would be equivalent to adopting a new trading arrangement, and, thus, amended Rule 10b5–1(c)(1) would be the applicable regulatory affirmative defense that would be available for that modified arrangement.

IV. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[349] the Office of Information and Regulatory Affairs has designated these rules a ''major rule,'' as defined by 5 U.S.C. 804(2).

V. Economic Analysis

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Under Section 2(b) of the Securities Act,[350] Section 3(f) of the Exchange Act,[351] and Section 2(c) of the Investment Company Act,[352] whenever the Commission is engaged in rulemaking and required to consider or determine whether an action is necessary or appropriate in (or, with

[344] *See infra* Sections V.E.1. and V.E.3.

[345] *See* letter from Davis Polk.

[346] With respect to estate planning vehicles controlled by the donor, we further note that transactions that ''effect only a change in the form of beneficial interest without changing a person's pecuniary interest in the subject equity securities'' are exempt from Section 16 reporting. *See* Rule 16a–13a [17 CFR 240.16a–13].

[347] *See* letters from BioNJ, Chevron, Cleary, Cravath, Davis Polk, Jones Day, SIFMA 2 and 3, Sullivan, and Wilson Sonsini.

[348] *See* Rule 10b5–1(c)(iv) (''Any modification or change to the amount, price, or timing of the purchase or sale of the securities underlying a contract, instruction, or written plan as described in paragraph (c)(1)(i)(A) of this section is a termination of such contract, instruction, or written plan, and the adoption of a new contract, instruction, or written plan'').

[349] 5 U.S.C. 801 *et seq.*

[350] 15 U.S.C. 77b(b).

[351] 15 U.S.C. 78c(f).

[352] 15 U.S.C. 80a–2(c).

respect to the Investment Company Act, consistent with) the public interest, it shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act requires the Commission to consider the impact on competition of any rules the Commission adopts under the Exchange Act and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[353]

We have considered the economic effects of the amendments, including their effects on competition, efficiency, and capital formation. Many of the effects discussed below cannot be quantified. Consequently, while we have, wherever possible, attempted to quantify the economic effects expected from the amendments, much of the discussion remains qualitative in nature. Where we are unable to quantify the economic effects of the amendments, we provide a qualitative assessment of the potential benefits, costs, and impacts of the amendments on efficiency, competition, and capital formation.

A. Broad Economic Considerations

The amendments are expected to provide greater transparency to investors (*i.e.,* decrease information asymmetries between insiders and outside investors) about issuer and insider trading arrangements and restrictions, as well as insider compensation and incentives, enabling more informed investment and voting decisions. The amendments are also expected to limit the opportunity for insider trading based on material nonpublic information (''MNPI'') [354] by adding new conditions to the Rule 10b5–1(c) affirmative defense, resulting in benefits to investors and improvement in insiders' incentives.

Insider trading enables certain investors who have access to inside information or who have the ability to influence the timing or substance of corporate disclosures to profit at the expense of other investors. Due to their access to MNPI, insiders can obtain illegitimate profits through the strategic timing of trades in the issuer's securities. These profits essentially unlawfully transfer wealth from other investors to the insider.[355] In addition, insider trading can distort the incentives of corporate insiders, which results in a loss of shareholder value and erodes investor confidence in the markets. Insider trading can also lead to reputational costs for companies.

1. Insider Trading Harms Investors, Distorts Insiders' Incentives, and Imposes Economic Costs on Investors and Capital Markets

The amendments are expected to decrease the incidence of unlawful insider trading.[356] Insider trading represents a breach of fiduciary or other similar obligation of trust and confidence.[357] Congress, the Courts, and the Commission have concluded that such insider trading is illegal.[358] Before analyzing each aspect of the final rule, in the interest of completeness, the Commission first reviews the economic literature on the insider trading prohibition.[359]

Insiders have information advantages that place them in a unique position to improperly obtain profits for themselves through strategic timing of trades. When an insider profits by trading on MNPI, those profits are obtained at other investors' expense.[360] Thus, reducing the incidence of insider trading is expected to benefit investors.[361]

When investors anticipate that they are dealing with better informed insiders that can profit at the investors' expense (*i.e.,* they anticipate the adverse selection problem due to the insiders' ability to trade on MNPI), investors can become reluctant to trade the issuer's shares. For this same reason, insider trading is likely to adversely affect price efficiency (*i.e.,* the extent to which stock prices reflect an issuer's fundamental value) [362] and liquidity.[363]

[353] 15 U.S.C. 78w(a)(2).

[354] *See supra* note 3.

[355] *See, e.g.,* Michael D. Guttentag, *Avoiding Wasteful Competition: Why Trading on Inside Information Should Be Illegal,* 86 Brook. L. Rev. 895 (2021).

[356] The discussion of broad economic considerations generally focuses on insider trading in stock except where specified otherwise. To the extent that insiders benefit from the timing of option awards and gifts of stock around MNPI, some of the economic effects associated with insider trading also may be manifested in those contexts. For a detailed discussion of the economic considerations applicable to option award timing and insider gift timing, *see infra* Sections V.D and V.E.

[357] *See infra* note 490.

[358] *See supra* Section I.

[359] *See, generally,* Alexandre Padilla & Brian Gardiner, *Insider Trading: Is There an Economist in the Room?,* 24 J. Private Enterprise 113, 123 (2009) (noting ''economists have progressively reached the same conclusion: that insider trading is harmful to investors, corporations, and stock exchanges, and, therefore, ought to be prohibited'').

[360] *See* Michael Manove, *The Harm from Insider Trading and Informed Speculation,* 104 Q. J. Econ. 823 (1989); William K.S. Wang, *Trading on Material Non-Public Information on Impersonal Stock Markets: Who Is Harmed and Who Can Sue Whom Under SEC Rule 10b–5?* 54 S. Cal. L. Rev. 1217 (1981).

[361] Misappropriation of information may have many economic effects, including but not limited to, revealing information to the market in a manner suboptimal to the issuer (and thus discouraging investment in information and increasing costs of keeping information private). Further, increased trading by insiders reduces incentives for liquidity provision through adverse selection, imposing economic costs on investors broadly. Finally, misappropriation has associated agency costs as it represents an undisclosed form of compensation and may lead to further divergence of interests between the manager and the shareholders. *See* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information,* 1981 Sup. Ct. Rev. 309, 315, 323, 331 (1981); *In re Melvin,* SEC Release No. 3682, 2015 WL 5172974, at *4 & n.31 (Sept. 4, 2015).

[362] A number of studies demonstrate adverse effects of insider trading on market efficiency. *See, e.g.,* Michael J. Fishman & Kathleen M. Hagerty, *Insider Trading and the Efficiency of Stock Prices,* 23 RAND J. Econ. 106 (1992) (showing that ''under certain circumstances, insider trading leads to less efficient stock prices. This is because insider trading has two adverse effects on the competitiveness of the market: it deters other traders from acquiring information and trading, and it skews the distribution of information held by traders toward one trader.''); Zhihong Chen et al., *The Real Effect of the Initial Enforcement of Insider Trading Laws,* 45 J. Corp. Fin. 687 (2017) (finding evidence that the initial enforcement of insider trading laws ''improves capital allocation efficiency by increasing price informativeness and reducing market frictions''); Robert M. Bushman et al., *Insider Trading Restrictions and Analysts' Incentives to Follow Firms,* 60 J. Fin. 35 (2005) (arguing that ''insider trading crowds out private information acquisition by outsiders'' and showing that ''analyst following increases after initial enforcement of insider trading laws'' in a cross-country sample); Nuno Fernandes & Miguel A. Ferreira, *Insider Trading Laws and Stock Price Informativeness,* 22 Rev. Fin. Stud. 1845 (2009) (finding that price informativeness increases with the enforcement of insider trading laws, but only in countries with a strong ''efficiency of the judicial system, investor protection, and financial reporting''); *see also* Alexander P. Robbins, *The Rule 10b5–1 Loophole: An Empirical Study,* 34 Rev. Quant. Fin. Acct. 199 (2010) (finding, in a sample of 10b5–1 plans of 81 NASDAQ-listed companies from 2004 to 2006 that ''10b5–1 plans have a significant negative effect on the liquidity of a firm's shares, and therefore the firm's cost of capital''). Some studies argue that insider trading improves price efficiency. *See, e.g.,* Hayne E. Leland, *Insider Trading: Should It Be Prohibited?,* 100 J. Pol. Econ. 859 (1992) (showing in a model that ''stock prices better reflect information'' when insider trading is permitted.); Utpal Bhattacharya et al., *When an Event Is Not an Event: The Curious Case of An Emerging Market,* 55 J. Fin. Econ. 69 (2000) (suggesting ''that unrestricted insider trading causes prices to fully incorporate the information before its public release''). *See generally Henry G. Manne, Insider Trading and the Stock Market* (1966). A reduction in insider trading can have nuanced effects on market efficiency. For example, the conclusions about the effect of insider trading on market efficiency may depend on whether the framework is static or dynamic. *See* David Easley et al., *Is Information Risk a Determinant of Asset Returns?,* 57 J. Fin. 2185 (2002).

[363] Various studies show that insider trading negatively impacts liquidity. S*ee, e.g.,* Raymond P.H. Fishe & Michel A. Robe, *The Impact of Illegal Insider Trading in Dealer and Specialist Markets: Evidence From a Natural Experiment,* 71 J. Fin. Econ. 461 (2004); Louis Cheng et al., *The Effects of Insider Trading on Liquidity,* 14 Pacific-Basin Fin.

Insider trading also imposes a cost on the investors in the company by distorting managerial incentives, as discussed below, which results in a loss of shareholder value. Thus, whether insiders are strategically timing stock sales and purchases based on MNPI can provide information to investors about insider incentives. In particular, the ability of officers and directors (who are either involved in making corporate decisions or play a crucial role in the oversight of such decisions) to profit from MNPI exacerbates conflicts of interest between officers/directors and other shareholders, resulting in inefficient, value-decreasing corporate decisions. For example, by protecting the insider from the brunt of the effects of poor corporate performance on the value of the insider's equity position through the ability to sell ahead of negative news, insider trading weakens incentive alignment and exacerbates agency conflicts (and, in turn, increases the cost of monitoring insiders).

One incentive distortion is that an insider may steer the company towards projects that require less effort or that yield higher private benefits even if such projects have a negative net present value (NPV) and thus decrease shareholder value.[364] To mitigate agency conflicts and better align insider incentives with those of shareholders, insiders are often compensated with equity. Because of insiders' ability to sell shares in advance of negative news, as described above, insiders may be less motivated to avoid negative NPV projects. Downside protection also incentivizes the insider to choose riskier negative-NPV projects due to the possibility of profiting on the upside.[365] Relatedly, if short-term investment projects yield more profitable MNPI (due, in part, to the reality that MNPI about long-term projects arrives less frequently or is less definitive), an insider may exhibit short-termism in making decisions at the company level at the expense of shareholder value.[366]

Being able to profit from MNPI also can distort insider incentives with respect to other corporate decisions that can affect the share price. For example, officers and directors engaged in insider trading may be disincentivized from sharing information efficiently within the firm if they can profit from withholding it and personally trading on it, which leads to inefficient corporate decisions and thus decreased shareholder value.[367]

Another economic cost of insider trading is that it may incentivize insiders to adjust the timing or content of corporate disclosure (*e.g.,* delaying the release, or increasing the frequency, of disclosing MNPI).[368] Manipulation of corporate disclosure causes price distortions and impairs the ability of investors to make informed investment decisions. Less informed investment decisions result in less efficient allocation of capital in investor portfolios, compared to a setting with more timely disclosures. To the extent that investors anticipate such disclosure gaming, they may commensurately increase their information gathering effort, resulting in higher information gathering costs for investors. Investors, however, have a limited ability to obtain timely and accurate information elsewhere.

Investor recognition of the potential incentive distortions and the risk of lower-quality corporate disclosures resulting from insider trading, as well as the risk of buying shares from or selling shares to a better informed insider, is likely to decrease investor confidence in the issuer and make investors less willing to buy or hold the issuer's

J. 467 (2006); Leland, *supra* note 362 (showing in a model that ''markets are less liquid'' and ''outside investors and liquidity traders will be hurt'' when insider trading is permitted); Laura N. Beny, *Do Insider Trading Laws Matter? Some Preliminary Comparative Evidence,* 7 Am. L. & Econ. Rev. 144 (2005) (finding that ''countries with more prohibitive insider trading laws have more diffuse equity ownership, more accurate stock prices, and more liquid stock markets''); Lawrence R. Glosten, *Insider Trading, Liquidity, and the Role of the Monopolist Specialist,* 62 J. Bus. 211 (1989) (showing in a model that insider trading reduces liquidity). *But cf.* Charles Cao et al., *Does Insider Trading Impair Market Liquidity? Evidence from IPO Lockup Expirations,* 39 J. Fin. Quant. Anal. 25 (2004) (not finding a negative effect of insider trading on liquidity).

[364] *See, e.g.,* Antonio E. Bernardo, *Contractual Restrictions on Insider Trading: A Welfare Analysis,* 18 Econ. Theory 7 (2001) (showing in a model that ''[f]or many reasonable parameter values, however . . . that managers may be too willing to take risky projects. In fact, managers will often choose the risky investment project when it has a lower expected return than the riskless investment project.''). In some circumstances, insider trading may remedy a manager's excess conservatism due to under-diversification. *See* Lucian A. Bebchuk & Chaim Fershtman, *Insider Trading and the Managerial Choice Among Risky Projects,* 29 J. Fin. Quant. Analysis 1 (1994). However, Bebchuk & Fershtman (1994) similarly acknowledge that ''[t]he desire to increase trading profits might lead the managers to prefer a very risky project even if it offers a lower expected return than a safer alternative.''

[365] *See, e.g.,* Easterbrook, *supra* note 361 (stating that ''[t]he opportunity to gain from insider trading also may induce managers to increase the volatility of the firm's stock prices. . . They may select riskier projects than the shareholders would prefer, because if the risk pays off they can capture a portion of the gains in insider trading and, if the project flops, the shareholders bear the loss.''). *But see* Robbins, *supra* note 362 (finding, in a sample of 10b5–1 plans of 81 NASDAQ-listed companies from 2004 to 2006 that ''insiders do not appear to increase the volatility of their own firms' shares in order to profit by trading on the basis of material nonpublic information under the protection of the 10b5–1 affirmative defense'').

[366] *See* M. Todd Henderson, *Insider Trading and Executive Compensation: What We Can Learn from the Experience with Rule 10b5–1,* Res. Handbook on Exec. Pay 299 (2012) (stating that short-termism is a cost of insider trading and that ''[e]xecutives looking to maximize the value of their shares may engage in conduct that increases the stock price in the short run at the expense of the long term so that they can profit from trading in firm stock''). Such managerial short-termism/myopia reduces shareholder value. *See, generally,* John R. Graham et al., *The Economic Implications of Corporate Financial Reporting,* 40 J. Acct. Econ. 3 (2005); Alex Edmans, *Blockholder Trading, Market Efficiency, and Managerial Myopia,* 64 J. Fin. 2481 (2009).

[367] *See, e.g.,* Robert J. Haft, *The Effect of Insider Trading Rules on the Internal Efficiency of the Large Corporation,* 80 Mich. L. Rev. 1051, (1982).

[368] *See, e.g.,* Ranga Narayanan, *Insider Trading and the Voluntary Disclosure of Information by Firms,* 24 J. Banking Fin. 395 (2000) (stating that ''[s]tringent enforcement of insider trading regulations induces more disclosure by firms''); Qiang Cheng & Kin Lo, *Insider Trading and Voluntary Disclosures,* 44 J. Acct. Rsch. 815 (2006) (finding that when ''managers plan to purchase shares, they increase the number of bad news forecasts to reduce the purchase price . . . insiders do exploit voluntary disclosure opportunities for personal gain, but only selectively, when litigation risk is sufficiently low''); Easterbrook, *supra* note 361 (stating that ''[t]he prospect of insiders' gains may lead the firm to delay the release of information''). Some studies also note that an opposite effect is possible—managers concerned about litigation may provide higher-quality disclosure before selling shares. *See, e.g.,* Jonathan L. Rogers, *Disclosure Quality and Management Trading Incentives,* 46 J. Acct. Rsch. 1265 (2008) (finding that ''[c]onsistent with a desire to reduce the probability of litigation . . . managers provide *higher quality* disclosures before selling shares than they provide in the absence of trading'' but also finding that ''[c]onsistent with a desire to maintain their information advantage, . . . some, albeit weaker, evidence that managers provide *lower quality* disclosures prior to purchasing shares than they provide in the absence of trading.''). In the context of Rule 10b5–1 plans, *see, e.g.,* Stanley Veliotis, *Rule 10b5–1 Trading Plans and Insiders' Incentive to Misrepresent,* 47 Am. Bus. L. J. 313, 330 & nn. 77–78 (2010) (stating that ''Rule 10b5–1 plans give insiders an incentive to accelerate the release of good news ahead of planned stock sales and to delay the release of bad news until after the sales are completed . . . As a practical matter, manipulation of the announcement's timing would be extremely difficult to prove because insiders are not required to disclose their 10b5–1 plans and firms seldom disclose a schedule for corporate announcements in advance . . .''); Karl T. Muth, *With Avarice Aforethought: Insider Trading and 10b5–1 Plans,* 10 U.C. Davis Bus. Law J. 65, 71 & nn. 32–33 (2009) (stating that ''executives can participate in the timing of news . . . about the company. Withholding or 'timing' news allows the executive to (imperfectly) time market response to news . . .''); John Shon & Stanley Veliotis, *Meeting or Beating Earnings Expectations,* 59 Mgmt. Sci. 1988 (2013) (finding that ''firms with insider sales executed under Rule 10b5–1 plans exhibit a higher likelihood of meeting or beating analysts' earnings expectations (MBE) . . . [that] this relation between MBE and plan sales is more pronounced for the plan sales of chief executive officers (CEOs) and chief financial officers (CFOs) and is nonexistent for other key insiders,'' and concluding that ''[o]ne interpretation of [their] results is that CEOs and CFOs who sell under these plans may be more likely to engage in strategic behavior to meet or beat expectations in an effort to maximize their proceeds from plan sales'').

shares.[369] The resulting reluctance to invest could have negative effects on capital formation and the ability to fund investments due to challenges in raising the required amount of capital.

2. Certain Rule 10b5–1 Plan Trading Practices May Raise Concerns About Potential Insider Trading

Over the years, various parties have raised concerns that certain persons have engaged in securities trading based on MNPI while availing themselves of the Rule 10b5–1(c)(1) affirmative defense.[370] Examples of practices that have raised such concerns include the strategic cancellation of previously adopted plans or individual trades on the basis of MNPI,[371] as well as the initiation or resumption of trading close in time to plan adoption or modification.[372]

As discussed in detail in Section II above, the Commission is adopting several amendments to address these practices, including modifications to the conditions of the affirmative defense under Rule 10b5–1(c)(1), additional disclosure requirements under new Item 408 of Regulation S–K, and additional disclosure of Rule 10b5–1 plan use in beneficial ownership forms. The new disclosure requirements are expected to affect the behavior of insiders by drawing scrutiny of investors and other market participants to trading practices of insiders.[373]

Combined, the amendments are expected to reduce the potential for insider trading through both Rule 10b5–1 plans and certain other trading arrangements not reliant on Rule 10b5–1. Deterring insider trading is expected to result in benefits for investor protection, capital formation, and orderly and efficient markets. By deterring insider trading, the amendments are expected to disincentivize insider behavior that is likely to harm the securities markets and the issuer, and undermine investor confidence.

3. Current Levels of Disclosure About Insider Trading Plans Limit the Ability of Investors To Identify the Risk of Insider Trading and To Consider the Associated Incentive Conflicts and Information Asymmetries in Their Investment Decisions

Existing gaps in the disclosure framework limit the information currently available to investors and other market participants regarding the use of insider trading plans and the extent to which trading based on MNPI potentially distorts insider incentives with respect to corporate decisions (and thus shareholder value). These gaps therefore limit the ability of investors to correctly value the issuer's shares, and thus make informed investment decisions.

The disclosure amendments will provide greater transparency to investors and decrease information asymmetries between insiders and outside investors about insider trading arrangements and insider trading policies and procedures, enabling more informed decisions about whether to invest in the issuer's shares and at what valuation. This added transparency may result in more efficient capital allocation and more informationally efficient pricing. The additional disclosure requirements may also indirectly yield potential capital formation benefits if they increase investor confidence in the issuer's governance.

4. The Economic Effects of the Amendments Are Uncertain or Difficult To Generalize

An important factor contributing to the uncertainty about the magnitude of the benefits of the amendments to Rule 10b5–1 is the potential for substitution of Rule 10b5–1 plans by other trading arrangements. The use of the Rule 10b5–1(c)(1) affirmative defense is voluntary. Insiders and companies may elect not to rely on the Rule 10b5–1(c)(1) affirmative defense if they perceive the costs of doing so to be too high. For example, insiders may instead adopt trading arrangements that do not rely on the amended Rule 10b5–1(c)(1) affirmative defense or trade without trading plans. However, doing so may entail its own costs and limitations for insiders.[374] The application of the disclosure requirements of new Item 408(a) of Regulation S–K to all officer and director Rule 10b5–1 and non-Rule 10b5–1 trading arrangements is expected to partly mitigate concerns that trading under non-Rule 10b5–1

[369] *See, e.g.,* Lawrence M. Ausubel, *Insider Trading in a Rational Expectations Economy,* 80 Am. Econ. Rev., 1022 (1990) (showing in a rational expectations model that ''[i]f 'outsiders' expect 'insiders' to take advantage of them in trading, outsiders will reduce their investment. The insiders' loss from this diminished investor confidence may more than offset their trading gains. Consequently, a prohibition on insider trading may effect a Pareto improvement.''). Further, informed trading by insiders can reduce the incentive for outside investors to acquire information. *See, e.g.,* Fishman & Hagerty, *supra* note 362.

[370] *See* IAC Recommendations, *supra* note 22; letter from David Larcker et al. (Mar. 10, 2021), *available at https://www.sec.gov/comments/s7-24-20/s72420-8488827-229970.pdf;* letter from CII (Apr. 22, 2021), *available at https://www.sec.gov/comments/s7-14-20/s71420-8709408-236962.pdf;* letter from CII (Mar. 18, 2021), *available at https://www.sec.gov/comments/s7-24-20/s72420-8519687-230183.pdf;* letter from CII (Sept. 25, 2020), *available at https://www.sec.gov/comments/s7-06-20/s70620-7843308-223819.pdf;* letter from CII (Dec. 13, 2018), *available at https://www.sec.gov/comments/s7-20-18/s72018-4766666-176839.pdf;* letter from CII (July 11, 2018), *available at https://www.cii.org/files/July%2011%202018%20SEC%20Reg%20Flex%20Letter%20Final.pdf;* letter from CII (Feb. 12, 2018, *available at https://www.sec.gov/comments/s7-07-17/s70717-3025708-161898.pdf;* letter from CII to Former Chairman Jay Clayton (January 18, 2018), *available at http://www.cii.org/files/issues_and_advocacy/correspondence/2018/January%2018%202018%20Rule%2010b5-1%20(finalI).pdf;* letter from CII (July 8, 2016), *available at https://www.sec.gov/comments/s7-06-16/s70616-49.pdf;* letter from CII to Former Chair Mary Jo White (May 9, 2013), *available at http://www.cii.org/files/issues_and_advocacy/correspondence/2013/05_09_13_cii_letter_to_sec_rule_10b5-1_trading_plans.pdf;* CII Rulemaking Petition.

[371] *See, e.g., Insider Trading and Stock Option Grants: An Examination of Corporate Integrity in the Covid-19 Pandemic* Before the H. Subcomm. On Investor Protection, Entrepreneurship, and Capital Markets, H. Comm. on Fin. Servs., 116th Cong. 5 (2020) (statement of Jill E. Fisch), available at *https://docs.house.gov/meetings/BA/BA16/20200917/111013/HHRG-116-BA16-Wstate-FischJ-20200917.pdf,;* Jagolinzer, *supra* note 19 (finding ''for a sample of 54 firms for which there is public disclosure of early sales plan terminations'' that ''early sales plan terminations are associated with pending positive performance shifts, reducing the likelihood that insiders' sales execute at low prices'' and noting that the sample size is small because there is no requirement to disclose sales plan terminations); Veliotis, *supra* note 368, at 328–30 (discussing concerns related to selective cancellations); Mavruk & Seyhun, *supra* note 19 (discussing selective cancellation concerns, providing indirect evidence, and concluding that its findings are ''consistent with the hypothesis that insiders intervene in their planned transactions to increase profitability''); *see also* Stephen L. Lenkey, *Cancellable Insider Trading Plans: An Analysis of SEC Rule 10b5–1,* 32 Rev. Fin. Stud. 4947 (2019) (concluding, in a theoretical framework, that ''[b]ecause the conditions under which the insider elects to adopt a plan often coincide with the conditions under which the termination option reduces welfare, an alternative regulatory framework wherein the insider could adopt a non-cancellable plan (and, thereby, credibly commit to execute his planned trade) would improve the investors' welfare under a wide set of circumstances.'').

[372] For a discussion of the evidence of returns following insider trades occurring close to plan adoption, s*ee infra* notes 387 through 397 and accompanying and preceding text. *But see infra* notes 398 through 406 and accompanying and following text. Existing disclosure requirements do not allow investors to obtain systematic or comprehensive data on plan cancellations or plan modifications (including cancellations of planned trades).

[373] Studies have found evidence that changes in mandatory disclosure affect behavior. *See, e.g.,* Elizabeth C. Chuk, *Economic Consequences of Mandated Accounting Disclosures: Evidence from Pension Accounting Standards,* 88 Acct. Rev. 395 (2013); Alice Adams Bonaimé, *Mandatory Disclosure and Firm Behavior: Evidence from Share Repurchases,* 90 Acct. Rev. 1333 (2015).

[374] *See infra* notes 439 through 440 and preceding and accompanying text.

trading arrangements may adversely impact investors.

The considerations presented above are generally applicable to all of the amendments discussed in this release. In the sections that follow, we provide a more detailed discussion of economic effects of the individual amendments, including the expected costs and benefits relative to the market baseline as well as reasonable alternatives. We separately discuss economic considerations related to the timing of option grants and insider gifts of stock in Sections V.D and V.E, respectively.

As discussed in Section III above, in response to commenters' concerns,[375] we are providing a six-month transition period for SRCs for compliance with the disclosure amendments. The transition period is expected to defer the costs and benefits of the amendments. By giving insiders and companies time to adjust their trading plans and recordkeeping processes, this transition period is expected to partially mitigate some of the SRCs' initial costs of preparing to comply with the amendments. In addition, it will enable these smaller companies to benefit from observing the compliance and disclosure practices of larger companies.

B. Amendments to Rule 10b5–1(c)(1)

The Commission is adopting additional conditions that must be satisfied for a trading arrangement to be eligible for the Rule 10b5–1(c)(1) affirmative defense. These amendments are intended to protect investors by decreasing the likelihood of, and the opportunities to, profit from MNPI through such trading arrangements.

The amendments narrow the conditions under which the Rule 10b5–1(c)(1) affirmative defense is available. First, the amendments establish mandatory cooling-off periods before any trading can commence under a Rule 10b5–1 trading arrangement after the adoption of a new or modified trading arrangement by persons other than the issuer. Second, the amendments impose a certification requirement as a condition of the Rule 10b5–1(c)(1) affirmative defense for trading arrangements of officers and directors. Third, the amendments restrict the availability of the affirmative defense for multiple overlapping trading arrangements involving open-market transactions under some conditions, as well as limit open-market single-trade trading arrangements to one such arrangement in any twelve-month period. Finally, the amendments expand the existing requirement that a Rule 10b5–1 trading arrangement must be ''given or entered into'' in good faith to add the condition that the trader ''act in good faith'' with respect to the trading arrangement. In a change from the proposal, we are not, at present time, adopting cooling-off periods or restrictions on multiple overlapping Rule 10b5–1 trading arrangements or single-trade trading arrangements with respect to the issuer. In response to public comments, we are making several changes from the proposal, including providing for a cooling-off period for officers and directors that is tied to both a specific number of days and to the date of disclosure of fiscal period results; imposing a shorter (30-day) cooling-off period for persons other than the issuer that are not officers or directors; clarifying the treatment of plan modifications; requiring the proposed officer and director certifications to be included in the plan itself and eliminating the requirement to maintain the certification for ten years; and making certain changes to the restrictions on multiple plans and single-trade plans.

1. Baseline and Affected Parties

We consider the economic effects of the amendments in the context of the regulatory and market baseline. A lack of comprehensive disclosure of Rule 10b5–1 trading arrangements makes it more difficult to provide complete data on existing Rule 10b5–1 practices and affected plan participants. Our estimates are limited by the voluntary nature of the Rule 10b5–1 disclosure in beneficial ownership filings, where insider trades are reported, as well as the limited scope of Rule 10b5–1 trades for which Form 144 reporting is required.[376] Based on beneficial ownership filings (Forms 3, 4, and 5) during calendar year 2021, we estimate that approximately 5,900 natural persons at approximately 1,700 companies reported trades under Rule 10b5–1 trading arrangements. This figure includes approximately 5,800 officers and directors at 1,600 companies; narrowing the sample to officers yields an estimate of approximately 4,700 officers at approximately 1,500 companies.[377] Due to the data limitations mentioned above, the actual number of affected parties likely is significantly larger.

Below, we discuss the available evidence on Rule 10b5–1 plans of officers, directors, and other natural persons. A recent academic study analyzed Form 144 data on insider trades under Rule 10b5–1 plans from January 2016 through May 2020.[378] The study documented that ''[t]he mean (median) cooling-off period is 117.9 (76)

[375] *See, e.g.,* letters from Cleary, Cravath, BioNJ, SIFMA 2, and Sullivan.

[376] Form 144 must be filed with the Commission by an affiliate as a notice of the proposed sale of restricted securities when the amount to be sold under Rule 144 during any three-month period exceeds 5,000 shares or units or has an aggregate sales price in excess of $50,000. *See* Rule 144(h) [17 CFR 230.144(h)]. Thus, Rule 10b5–1 plan trades below that threshold are not required to be reported on Form 144 and thus may not be in our data. Further, because the vast majority of Form 144 filings were made in paper form during the considered period, we rely on information from such paper filings extracted and processed by the vendor for the Thomson Reuters/Refinitiv insiders dataset (version retrieved June 27, 2022).

[377] The estimate is based on the data from filings on Forms 3, 4, and 5 for trades during calendar year 2021 that reported Rule 10b5–1 plan use (obtained from Thomson Reuters/Refinitiv insiders dataset (version retrieved June 27, 2022)). The estimate only captures natural persons with Rule 10b5–1 plans that have Section 16 reporting obligations, and thus represents a lower bound on the number of affected plan participants (for instance, it excludes employees that are not Rule 16a–1(f) officers as well as any other persons with a Rule 10b5–1 trading plan that do not have a Section 16 reporting obligation). Officers and directors are identified based on the role code (beneficial owners and affiliates are not included in the count). Combining data from Form 144 filings with planned sale dates in calendar year 2021 that reported Rule 10b5–1 plan use (also obtained from Thomson Reuters/Refinitiv insiders dataset (version retrieved June 27, 2022)) and the data from filings on Forms 3, 4, and 5 cited above, we estimate that approximately 7,000 natural persons at approximately 1,800 companies (which includes approximately 6,000 officers and directors at approximately 1,700 companies; or when limited to officers only, approximately 4,900 officers at approximately 1,500 companies) reported trades under Rule 10b5–1. Due to gaps in the reporting regime, we cannot be certain whether the higher prevalence of plans reported for officers is due to their higher prevalence in general or due to greater disclosure of such plans.

[378] *See* Gaming the System, *supra* note 20. The study presents data ''on all sales of restricted stock filed on Form 144 between January 2016 and May 2020 and the adoption date of any corresponding 10b5–1 plans . . . In total, we have data on 20,595 plans, which covers the trading activity by 10,123 executives at 2,140 unique firms. These plans are responsible for a total of 55,287 sales transactions totaling $105.3 billion during our sample period. Average (median) trade size is $1.9 million ($0.4 million) . . . .'' The analysis based on Form 144 data has the advantage of not being subject to voluntary reporting bias. However, as a caveat, planned resales reported on Form 144 represent a subset of all trades and may not be representative of all Rule 10b5–1 trades by insiders (*e.g.,* of purchases, or of sales of unrestricted stock). By comparison, Mavruk & Seyhun examine a larger sample of plan trades identified by a voluntary Rule 10b5–1 checkbox on beneficial ownership forms. They examine transactions for ''an average of 14,211 insiders in 3875 firms for each year between 2003 and 2013.'' *See* Mavruk & Seyhun, *supra* note 19. Relatedly, Hugon & Lee (2016) utilize a sample of ''voluntary disclosures of 10b5–1 plan participation in SEC Form 4 filed between October 2000 and December 2010.'' *See supra* note 19. *See also, e.g.,* Lee (2020), *supra* note 35; *See* Rik Sen, *Are Insider Sales Under 10b5–1 Plans Strategically Timed*?, 2008 N. Y. U. (Working Paper) (2008); Eliezer M. Fich et al., *When and How Are Rule 10b5–1 Plans Used for Insider Stock Sales*?, 2021 Drexel U., U.T. Austin & C.U.L. (Working Paper) (2021) (also utilizing Form 4 data). Data on Rule 10b5–1 trades by issuers is not available.

days,'' ''[a]pproximately 14 percent of plans commence trading within the first 30 days, and 39 percent within the first 60 days,'' and ''[a]pproximately 82 percent of plans commence trading within 6 months.'' [379] A set of subsequent analyses by the Wall Street Journal (collectively, the ''WSJ Analysis'') examined Washington Service [380] data on ''169,000 forms from company insiders submitted from 2016 through 2021'' and found that ''about a fifth of the [prearranged stock sales] occurred within 60 trading days of a plan's adoption.'' [381] As a caveat, this data did not indicate whether the trading time frames were due to an issuer's policies, the insider's own timing or scheduling, or execution of trades under a plan (*i.e.,* whether there is a ''cooling-off period'' is not known—only the time between plan adoption and the first trade is calculated).

Using Form 144 data provided by the Washington Service for a more recent period (January 2, 2018–September 13, 2022), we find that the mean (median) Rule 10b5–1 plan has the first trade 102 (71) days after adoption, with 13.2 percent of first trades pursuant to a plan occurring within thirty days of the plan date and 41.5 percent occurring within 60 days of the plan date.[382] A shorter period of time between plan adoption and the first trade under the plan is also associated with a larger trade size: trades occurring within 90 days of plan adoption have a median size of $748,000 compared with a median size of $403,000 for those trades occurring more than six months after plan adoption. Further, single-trade plans constitute approximately 44 percent of plans during the time period examined.[383]

A 2016 industry survey of public companies also examined their Rule 10b5–1 plan practices.[384] The survey found, among other things, that: (i) 77 percent of the respondents had a mandatory cooling-off period of 60 days or fewer and a cooling-off period of 30 days was the most common cooling-off period among respondents (41 percent); (ii) 98 percent of the respondents reviewed and approved their insiders' Rule 10b5–1 plans to some degree; (iii) 55 percent of the respondents allowed early termination of plans, and 40 percent of the respondents allowed modification of plans (the survey does not report the extent of overlap between these two subsets of respondents); and (iv) 18 percent of respondents allowed insiders to maintain multiple overlapping plans while 82 percent disallowed multiple overlapping plans.[385] A 2021 industry survey of public companies (cited by one commenter) provided more recent information about Rule 10b5–1 plan practices.[386] The survey found, among other things, that: (i) at 39 percent of respondents the aggregate number of 10b5–1 plans by their C Suite had increased over the prior two years, and at 74 percent of respondents at least one insider adopted a Rule 10b5–1 plan in the prior fiscal year; (ii) 13 percent of respondents required the C Suite to use Rule 10b5–1 plans, 6 percent required directors to use Rule 10b5–1 plans, and three percent required other insiders to use Rule 10b5–1 plans, with companies with higher market capitalization being more likely to require insiders to sell through Rule 10b5–1 plans; (iii) a significant majority of respondents reported reviewing and approving the Rule 10b5–1 plans entered into by their C Suite and directors; (iv) the most common cooling-off period was 30 days—9 percent of respondents reported not imposing a cooling-off period, 10 percent—a cooling-off period of less than 30 days, 51 percent—30 days, 13 percent—longer than 30 days, and 8 percent—a cooling-off period until the opening of trading window in the next quarter (with ''other'' cooling-off periods comprising the remainder); (v) the majority of respondents allowed insiders to terminate or modify their Rule 10b5–1 plans (with many of those imposing restrictions in conjunction with terminations or modifications) and permitted insiders with an existing Rule 10b5–1 plan to sell shares outside of the plan; (vi) 48 percent of respondents allowed while 52 percent of respondents prohibited multiple, overlapping Rule 10b5–1 plans; and (vii) 23 percent of respondents required disclosures of Rule 10b5–1 plan adoptions by the C Suite.

Various studies have sought to examine the potential use of MNPI for trading under Rule 10b5–1 by looking at the returns around trades under such plans (with the caveats about data availability). The WSJ Analysis concluded that, on average, Rule 10b5–1 sales occurring closer in time to plan adoptions were more likely to precede declines in share prices than sales conducted later after plan adoptions.[387] For insiders that sold shares within 0–30 days, 31–60 days, and 61–90 days following plan adoptions, average two-month post-sale excess returns (calculated net of sector returns) were negative: –1.7 percent, –1.4 percent, and –0.7 percent, respectively. For insiders that sold shares within 91–120, 121–150, 151–180, and 181+ days following plan adoptions, average two-month post-sale excess returns were positive: 0.3 percent, 1.5 percent, 1.4 percent, and 0.6 percent, respectively.[388] The Gaming the System study documented abnormal trends and returns following some insider sales under Rule 10b5–1 (as compared to both standard open-market trades and different kinds of Rule 10b5–1 trades), which suggests potential insider trading under such plans. For example, the study shows abnormal industry-adjusted returns over a six-month period following the first sale to be –2.5 percent for plans with the first trade occurring less than 30 days after plan adoption and –1.5 percent for plans with the first trade occurring between 30 and 60 days after plan adoption, but no evidence of such

[379] Gaming the System, *supra* note 20.

[380] The Washington Service is a research firm that provides data about trades by insiders.

[381] *See* McGinty & Maremont, *supra* note 32; *see also* Tom McGinty, *Methodology: How the Journal Analyzed the Data on Insider Stock Sales,* Wall St. J. (June 29, 2022 (retrieved from Factiva database).

[382] We estimate that 13.2 percent of trades occur within 0–30 days. 28.3 percent of trades occur within 31–60 days, and 22.3 percent within 61–90 days. In total, 63.8 percent of trades occur within 90 days of the date of plan adoption and 86.9 percent of plans commence trading within six months.

[383] As a caveat, the data does not show the dates of all scheduled trades, only the dates of executed trades. Thus, some ''single-trade'' plans may be multi-trade plans in progress, or multi-trade plans with all but one trade cancelled.

[384] *See* Morgan Stanley & Shearman & Sterling LLP, Defining the Fine Line: Mitigating Risk with 10b5–1 Plans (2016), *available at https://advisor.morganstanley.com/capitol-wealth-management-group/documents/field/c/ca/capitol-wealth-management-group/Defining_the_Fine_LineLocked_Version.pdf.* The survey included public company members of the Society of Corporate Secretaries & Governance Professionals. The respondents and their practices related to Rule 10b5–1 plans are not necessarily representative of all issuers subject to the amendments and their Rule 10b5–1 plan policies and practices. Separately, the survey stated that that 51 percent of S&P 500 companies had Rule 10b5–1 plans in 2015.

[385] *Id.*

[386] *See* letter from SCG; Soc'y for Corp. Governance et al., 10b5–1 Plan Practices 2021 Survey (2021), *available at https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/Final_10b5-1_Plan_Report_CS_Survey_2021_V6_-10-19-21_W_o_Comments.pdf* (''SCG 2021 Survey''). The survey included 145 respondents (with fewer respondents providing answers to some questions) among public company members of the Society for Corporate Governance (which need not be the same respondents as the respondents to the 2015 survey). The respondents and their practices related to Rule 10b5–1 plans are not necessarily representative of all issuers subject to the amendments and their Rule 10b5–1 plan policies and practices. For example, 92 percent of respondents to the 2021 survey had their IPO more than five years ago and 58 percent had market capitalization of at least $10 billion, which may indicate a greater representation of larger, more established companies.

[387] *See* McGinty & Maremont, *supra* note 381.

[388] *Id.*

abnormal returns after the insider sale when the first trade occurs more than 60 days after plan adoption. However, the study also finds that the trades of single-trade plans (which comprise 49 percent of the 10b5–1 plans in the study) are consistently loss-avoiding regardless of cooling-off period, with single-trade plans with short cooling-off periods exhibiting the highest average loss avoidance (avoiding an industry-adjusted price decline of –4 percent).[389] In contrast, the study finds that the trades under multiple-trade plans are only loss-avoiding within 30 days of plan adoption (industry-adjusted price decline of –1 percent). The study also finds abnormal returns of between –2 percent and –3 percent for plans that execute sales in the window between when the plans are adopted and quarterly earnings announcements, but no price drop is found following sales after the earnings announcements.

Negative abnormal returns after insider sales under Rule 10b5–1 plans indicate potential insider trading ahead of negative news. A lack of such negative returns after insider sales under plans with more time between plan adoption and first trade could be indicative of inside information becoming stale with the passage of time. Similarly, a lack of negative returns when insider sales occur after the quarter's earnings announcement may suggest less potential for informed selling once the earnings information has been made public. As a caveat, the tests of statistical significance of the differences are not shown in the study, so we cannot assess whether the economic differences discussed above have statistical significance.

Several other studies document abnormal returns following trading by insiders who use Rule 10b5–1 plans. For example, a 2009 study of the use of Rule 10b5–1 plans finds that ''insiders' sales systematically follow positive and precede negative firm performance, generating abnormal forward-looking returns larger than those earned by nonparticipating colleagues,'' that ''a substantive proportion of randomly drawn plan initiations are associated with pending adverse news disclosures,'' and that ''early sales plan terminations are associated with pending positive performance shifts.'' [390] A 2016 study examined insider sales at financial institutions prior to the 2008 financial crisis and found that ''net insider sales in the 2001Q2–2007Q2 pre-financial crisis quarters predict not-yet-reported non-performing securitized loans and securitization income for those quarters, and that net insider sales during 2006Q4 predict write-downs of securitization-related assets during the 2007Q3–2008Q4 crisis period'' and, crucially for this analysis, that ''insiders avoid larger stock price losses through 10b5–1 plan sales than through non-plan sales.'' [391] A different 2016 study presented evidence of ''insiders selling shares prior to imminent bad earnings news through their Rule 10b5–1 trading plans.'' [392] A 2020 study presents evidence consistent with insiders using 10b5–1 plans to sell stock in advance of disappointing earnings results.[393] The study further finds that some of the more aggressive insider trading on earnings information shifted into Rule 10b5–1 plans after adoption of the rule.[394] The study also found that these insiders make the following types of trades: infrequent, irregularly timed, close to the plan initiation date, and executed during traditional blackout periods.[395] Finally, a different 2020 study found that ''public companies disproportionately disclose positive news on days when corporate executives sell shares under predetermined Rule 10b5–1 plans,'' with such disclosure of good news on Rule 10b5–1 selling days being most prevalent ''in the health care sector and among mid-cap firms.'' [396] The study further observed that ''stock prices reverse after high levels of Rule 10b5–1 selling on positive news days, and that the price reversal increases with the share volume of Rule 10b5–1 selling.'' [397]

However, a 2008 study found ''no significant difference in stock price performance following plan sales and non-plan sales.'' [398] The study also reports that ''price contingent orders (*e.g.,* limit orders), a common feature in trading plans, give rise to empirical patterns that have been taken as evidence of strategic timing of sales.'' [399] Insiders may incorporate limit orders into trading plans because such plans may involve trading over months and even years and therefore expose the insider to potentially significant market fluctuations. The limitations of the data about insiders' trades prevent us from estimating the prevalence of limit orders in such plans and comparing it to trades outside such plans, or assessing the magnitude of the potential bias in the profitability of trades executed under Rule 10b5–1 plans due to limit order use.[400] Nevertheless, some evidence suggests that limit orders cannot account for the entirety of the abnormal returns documented in other studies.[401] Thus, we remain concerned about abnormally profitable insider trading under Rule 10b5–1.

Two other studies find evidence that insiders can profit when trading under 10b5–1 plans, although these profits may be the same as or smaller than trades that do not qualify for the

[389] *See supra* note 383 and *infra* notes 400 and 435.

[390] *See, e.g.,* Jagolinzer, *supra* note 19, at 224.

[391] *See* Stephen G. Ryan, et al., *Securitization and Insider Trading,* 91 Acct. Rev. 649 (2016).

[392] *See* Jonathan A. Milian, *Insider Sales Based on Short-Term Earnings Information,* 47 Rev. Quant. Fin. Acct. 109 (2016) (examining data on insider sales under Rule 10b5–1 based on beneficial ownership filings from August 2004 through May 2010). As a caveat, the study specifies that the plan identification may be imprecise: it ''use[s] the timing of insiders' Rule 10b5–1 trades relative to each other in order to infer a sales plan,'' ''[g]iven the lack of disclosure requirements in SEC Rule 10b5–1 and the nature of the data.''

[393] *See* Lee (2020), *supra* note 35.

[394] *Id.*

[395] *Id.*

[396] *See* Joshua Mitts, *Insider Trading and Strategic Disclosure,* 2020 Colum. U. (Working Paper) (2020).

[397] *Id.*

[398] *See* Rik Sen, *Are Insider Sales Under 10b5–1 Plans Strategically Timed?*, 2008 N.Y.U. (Working Paper) (2008). The study uses Form 4 data from January 2003–June 2006. As an important caveat, reporting of 10b5–1 trades on Form 4 is voluntary. Thus, trades classified as ''non-10b5–1'' trades in the study may include 10b5–1 plan trades.

[399] *Id; see also* letter from Anonymous.

[400] Data biases due to the potential use of limit orders may potentially interact with data biases due to incomplete identification of Rule 10b5–1 trades in existing data based on beneficial ownership reporting requirements. Thus, the true magnitude of the abnormal profits from insider trading in Rule 10b5–1 plans may differ from those observed in the data from available reporting.

[401] *See, e.g.,* Jagolinzer, *supra* note 19 (comparing Rule 10b5–1 plan and non-Rule 10b5–1 trading arrangement subsamples with a similar one-month price run-up and concluding that ''predictable'' mean reversion following sustained price increases that may have triggered limit sell orders is unlikely to explain the abnormal returns following 10b5–1 sales); *see also* Shon & Veliotis, *supra* note 368 (advising ''caution in making inferences, because the potential presence of limit order transactions makes it difficult to unambiguously determine the direction of causality'' but also performing several tests to attempt to rule out the effects of limit orders—including, for instance, the finding that, with the caveat that such disclosure is voluntary, only approximately 1.07 percent of the 10b5–1 sample included keywords related to limit orders in the footnotes to Form 4; the finding that either controlling for the indicator for disclosed limit order use or excluding such observations from the analysis does not change any of the results; the finding that excluding the categories of firms found more likely to be associated with disclosed limit order use does not affect the results; and the finding that abnormal returns are driven by CEOs and CFOs, who are more likely to have discretion over meeting or beating earnings expectations). Further, ''[t]here is evidence, however, that a substantive proportion of randomly drawn plan initiations are associated with pending adverse news disclosures. There is also evidence that early sales plan terminations are associated with pending positive performance shifts, reducing the likelihood that insiders' sales execute at low prices.'' *See* Jagolinzer, *supra* note 19.

affirmative defense. A 2016 study finds negative abnormal returns after insider sales under Rule 10b5–1 as well as positive abnormal returns after insider purchases under Rule 10b5–1 (over a one-month holding period).[402] However, the study does not find significant differences between the abnormal returns following insider trades under Rule 10b5–1 and other insider trades.[403] A 2021 study finds that ''non-plan sales are, on average, preceded by a larger price run-up (3.0 percent versus 1.4 percent) and followed by a larger price decline (−1.6 percent versus −1.0 percent) than plan sales . . . consistent with greater opportunistic behavior by CEOs who trade outside of Rule 10b5–1 plans.'' [404] Further, focusing on ''the 25 percent of sales with the largest ratio of transaction value to the CEO's most recent total annual compensation,'' this study found that ''the average cumulative abnormal return (''CAR'') during the 40 trading days before the sale is 3.68 percent for non-plan sales and 1.77 percent for plan sales'' and ''the average CAR for the 40 trading days after the sale is –2.24 percent for non-plan sales and –2.41 percent for plan sales.'' [405] The study concludes that ''the overall level of opportunistic behavior is smaller for sales within Rule 10b5–1 plans than for sales outside of such plans'' but that ''CEOs who have a lot of money at stake are able to trade opportunistically even if the transaction is executed under a Rule 10b5–1 plan.'' [406] The findings of these studies differ, in part, due to differences in the samples used for analysis (*i.e.,* the sample periods and data source, which were beneficial ownership forms or Form 144 filings) and their methodologies (including, among other assumptions, whether insider trading under Rule 10b5–1 is examined in isolation or in comparison with other insider sales and purchases). As noted above, the lack of data on Rule 10b5–1 plans can make it difficult to extrapolate from the available evidence to all trading under Rule 10b5–1. However, overall, the evidence on the use of Rule 10b5–1 plans in the above studies raises concerns about insider trading.

Data on companies' use of Rule 10b5–1 plans are very limited. Most of the commenters discussing issuer Rule 10b5–1 plans referred to issuer repurchases.[407] However, one commenter expressed concern that the Proposing Release underestimated the number of issuers that conduct repurchases under Rule 10b5–1.[408] Some companies voluntarily disclose their use of Rule 10b5–1 plans to carry out stock repurchases on Form 8–K or in periodic reports. Such voluntary reporting is likely to underestimate the number of affected companies. Nevertheless, in the current disclosure regime, it is the main direct source of information on the prevalence of Rule 10b5–1 repurchases. One study examining different repurchase methods identified ''at least 200 announcements of repurchases using Rule 10b5–1 per year from 2011 to 2014'' and found that ''[In 2014] 29% [of repurchase announcements] included a 10b5–1 plan.'' [409] Based on a textual search of calendar year 2021 filings, we estimate that approximately 210 companies disclosed share repurchase programs executed under a Rule 10b5–1 plan.[410] Another, indirect approach to estimating the number of affected issuers involves extrapolating the number of companies conducting repurchases under Rule 10b5–1 in a given year from a combination of the incidence of Rule 10b5–1 plan use among voluntarily announced repurchases (estimated at 29 percent as previously noted [411]) and the overall number of companies conducting repurchases based on their financial statements.[412] Based on data from Compustat and EDGAR filings for fiscal years ending between January 1, 2021 and December 31, 2021, we estimate that approximately 3,600 operating companies conducted repurchases, yielding an estimate of approximately 1,000 companies affected by the Rule 10b5–1 amendments.[413] Due to a lack of an issuer trade reporting requirement similar to that for officers and directors, we are not aware of data or studies specific to companies' actual trading under Rule 10b5–1 plans.

2. Benefits

The main benefit of the amendments to Rule 10b5–1(c)(1) is the anticipated reduction in insider trading based on MNPI through such plans (the benefits of which are discussed in greater detail in Section V.A above). Below, we discuss how each of the amendments to Rule 10b5–1(c)(1) individually is expected to reduce such insider trading. In addition, we expect the provisions to work in tandem to substantially reduce insider trading through Rule 10b5–1 plans. In particular, for officers and directors, the certification requirement is expected to complement the effects of the cooling-off period. Cooling-off periods are expected to work together with the restrictions on the use of multiple overlapping plans under Rule 10b5–1(c)(1) to possibly prevent a portion of potentially opportunistic plan cancellations based on MNPI. Thus, while we separately discuss below the benefits of each individual provision for reducing insider trading through such plans, the combined application of the various amendments discussed here may also generate synergies.

As discussed in Section V.A above, because the Rule 10b5–1(c)(1) affirmative defense is voluntary, if insiders find the conditions of this defense to be overly burdensome, they

[402] *See* Mavruk & Seyhun, *supra* note 19.

[403] *Id.* As noted above, due to voluntary reporting of the Rule 10b5–1 flag on beneficial ownership forms, trades classified as ''non-10b5–1'' trades in the study may include Rule 10b5–1 plan trades.

[404] *See* Eliezer M. Fich et al., *supra* note 378. This study examined ''11,250 stock sales by 1,514 CEOs at 1,312 different public firms during the 2013 to 2018 period'' and found that, ''[o]f these stock sales, 6,953 are identified in SEC Form 4 filings as executed through Rule 10b5–1 plans.'' As noted above, due to voluntary reporting of the Rule 10b5–1 flag on beneficial ownership forms, trades classified as ''non-10b5–1'' trades in the study may include Rule 10b5–1 plan trades.

[405] *Id.* Cumulative abnormal returns are returns in excess of returns that would be expected given the security's systematic risk over the period of time in question.

[406] *Id.*

[407] *See supra* note 71.

[408] *See* letter from Cravath.

[409] *See* Alice Bonaimé et al., *Payout Policy Trade-Offs and the Rise of 10b5–1 Preset Repurchase Plans,* 66 Mgmt. Sci. 2762 (2020). The study does not provide evidence of issuers' use of such plans for insider trading through issuer repurchases. It focuses on such plans being less flexible and representing a stronger pre-commitment than open market repurchases. The study finds that, ''[c]onsistent with [such] plans signaling commitment, Rule 10b5–1 repurchase announcements are associated with greater and faster completion rates, with more positive market reactions, and with more dividend substitution than open market repurchases.''

[410] The estimate is based on a textual search of calendar year 2021 filings of Forms 10–K, 10–Q, 8–K, as well as amendments and exhibits thereto in Intelligize. The estimate is based on a textual search using keywords ''10b5–1 repurchases'' or a combination of keywords ''repurchase plan'' and ''10b5–1'' (the approach used in the Proposing Release estimate). Due to a lack of standardized presentation and the unstructured (*i.e.,* non-machine-readable) nature of the disclosure, these estimates are approximate and may be over- or under-inclusive.

[411] *See supra* note 409.

[412] Using the number of issuers that announce repurchases in a given year would underestimate the number significantly because issuers may continue to implement a previously announced repurchase program over multiple years.

[413] As a caveat, a complete estimate of the number of affected filers is limited by data coverage. A source of data commonly used in existing studies, Standard & Poor's Compustat, has limited coverage of small and unlisted registrants and foreign private issuers. Therefore, we supplemented Standard & Poor's Compustat Fundamentals Annual data (version retrieved June 27, 2022) with structured data from financial statement disclosures in EDGAR filings (retrieved June 27, 2022), with the caveat that variation in filer use of tags to characterize their repurchases may result in some data noise. 29 percent × 3,600 = 1,044 ~ 1,000.

may elect not to rely on it.[414] If migration of trading outside of Rule 10b5–1 plans results, in some instances, in an increase or no change in the incidence of insider trading, the benefits of the amendments may be attenuated or offset.[415] Whether any shift to trading outside of Rule 10b5–1 plans results in a change to the amount of insider trading will depend on the extent to which other mechanisms (such as legal liability, enforcement actions, listing standards, reputational concerns, and corporate governance mechanisms) and any changes that companies implement to their insider trading policies after the amendments deter insider trading incentives.

In the subsections below we discuss the individual benefits of these amendments to Rule 10b5–1(c)(1).

i. Cooling-Off Periods

With respect to Rule 10b5–1 plans of officers and directors, the final rules add, as a condition to the availability of the affirmative defense under Rule 10b5–1(c)(1) a cooling-off period before any purchases or sales under the trading arrangement may commence. In a change from the 120-day cooling-off period proposed for officers and directors, the cooling-off period for officers and directors in the final rules is the later of (1) 90 days following plan adoption or modification or (2) two business days following disclosure of the financial results for the reporting period in which the plan was adopted (which need not exceed 120 days following plan adoption or modification). The cooling-off period for officers and directors is expected to reduce incentives to enter or modify plans based on MNPI by ensuring that trades under the plan are executed at prices that fully reflect the material information that was previously non-public. This is expected to substantially weaken officers' and directors' incentives to enter or modify Rule 10b5–1 plans based on MNPI, in line with the suggestions of commenters.[416] The length of the cooling-off period will largely prevent officers and directors from profiting on unreleased earnings results for the quarter in which the Rule 10b5–1 plan was adopted as well as other types of MNPI (such as a potential merger or regulatory action).[417] It also is consistent with several recommendations regarding cooling-off periods for officers and directors.[418] To the extent that MNPI may be time-sensitive, we expect the cooling-off period to effectively discourage officers and directors from adopting new or modified plans on the basis of MNPI.[419]

Some evidence of the extent to which requiring a longer period of time between Rule 10b5–1 plan adoption and the first trade under the plan could prevent insider trading is presented in the WSJ analysis. It shows that shorter periods between plan adoption and the first sale were associated with more negative stock returns after the sale, which implies that more insider trading occurs in cases of trading commencing closer to plan adoption.[420]

The cooling-off period for officer and director Rule 10b5–1 trading arrangements will also help deter trades under a newly adopted or modified plan before the disclosure of that quarter's earnings. Trades under a Rule 10b5–1 trading arrangement prior to an earnings announcement appear to be more likely to involve insider trading. For example, the Gaming the System study found that ''38 percent of plans adopted in a given quarter also execute trades before that quarter's earnings announcement (*i.e.,* in the 1 to 90 days prior to earnings [sic]),'' that ''[s]ales occurring between the adoption date and earnings announcement are about 25 percent larger than sales occurring more than six months after the earnings announcement,'' and that ''plans that execute a trade in the window between when the plan is adopted and that quarter's earnings announcement anticipate large losses and foreshadow considerable stock price declines.'' [421]

With respect to persons other than the issuer that are not officers or directors, in a change from the proposal, in line with the suggestions of several commenters,[422] the final amendments impose a shorter (30-day) cooling-off period (discussed in greater detail in Section II.A.1.c above). Similar to the cooling-off period for officers and directors, the cooling-off period for persons other than officers, directors, or the issuer is expected to benefit investors by reducing the potential for the use of Rule 10b5–1 plans for insider trading based on MNPI. Although persons other than officers, directors, or the issuer may be less likely to have MNPI about company-wide financial results or influence key corporate decisions, such persons may nevertheless come into possession of MNPI. For example, large shareholders other than officers and directors may exert control rights or have informational advantages enabling

[414] *But see infra* note 441.

[415] *But see infra* notes 439 through 440 and preceding and accompanying text.

[416] *See supra* notes 47 through 51 and accompanying text; *see also supra* Section II.A.1.c for a discussion of the rationale for the cooling-off period we are adopting.

[417] *See, e.g.,* Gaming the System, *supra* note 20; *see also supra* note 393 and accompanying text.

[418] *See, e.g.,* letters from AFL–CIO, CII, CO PERA, ICGN, Public Citizen O'Reilly, NASAA; *see also* Council of Institutional Investors, Request for rulemaking concerning amending Rule 10b5–1 or further interpretive guidance regarding the circumstances under which Rule 10b5–1 trading plans may be adopted, modified, or cancelled, Dec. 28, 2012, at p. 3, *available at https://www.sec.gov/rules/petitions/2013/petn4-658.pdf* (recommending a minimum three-month waiting period); Yafit Cohn & Karen Hsu Kelley, *Simpson Thacher Discusses Combating Securities Fraud Allegations with 10b5–1 Trading Plans* (Aug. 10, 2017), *available at https://clsbluesky.law.columbia.edu/2017/08/10/simpson-thatcher-discusses-combatting-securities-fraud-allegations-with10b5-1-trading-plans/* (recommending that ''insiders wait 30 to 90 days before selling stock under the trading plan for the first time''); David B.H. Martin et al., *Rule 10b5–1 Trading Plans: Avoiding the Heat, Bloomberg BNA Securities Regulation & Law Report,* 45 SRLR 438, 2013 (referring to the three-month cooling-off period recommended by the Council of Institutional Investors and stating that ''[w]aiting periods of this duration, or those which restrict trading until after issuance of the next regular earnings release, may assist insiders in demonstrating good faith and that trades under a Rule 10b5–1 plan were not designed to take advantage of material nonpublic information.''); IAC Recommendations, *supra* note 22 (recommending a cooling-off period of at least four months).

[419] The cooling-off period condition for officers and directors that involves the disclosure of financial results references the disclosure on Form 10–K or 10–Q (or for a foreign private issuer, on Form 20–F or 6–K). Earnings results are typically announced prior to the periodic report filing. This provision is expected to benefit investors by ensuring that officers and directors trading under a Rule 10b5–1 plan cannot profit from MNPI contained in a periodic report that was not incorporated in a current report or press release. Form 10–Q and 10–K filings are associated with an announcement return, consistent with such disclosures conveying new information to the market. *See* Paul A. Griffin, *Got Information? Investor Response to Form 10–K and Form 10–Q EDGAR Filings,* 8 Rev. Acc. Stud. 433 (2003). Periodic reports have been shown to have incremental information content compared to earnings releases. *See, e.g.,* Yifan Li, Alexander Nekrasov, & Siew Hong Teoh, *Opportunity Knocks But Once: Delayed Disclosure of Financial Items in Earnings Announcements and Neglect of Earnings News,* 25 Rev. Acc. Stud. 159 (2020); Angela K. Davis & Isho Tama-Sweet, *Managers' Use of Language Across Alternative Disclosure Outlets: Earnings Press Releases versus MD&A,* 29 Contemp. Acc. Res. 804 (2012); Steven Huddart, Bin Ke, & Charles Shi, *Jeopardy, Non-public Information, and Insider Trading around SEC 10–K and 10–Q Filings,* 43 J. Acc. Econ. 3 (2007).

[420] *See supra* note 381; *see also Gaming the System, supra* note 20 (similarly finding that shorter periods between plan adoption and first sale are associated with more negative returns following the sale, and also noting that approximately 14 percent of insider Rule 10b5–1 plans have the first trade within 30 days of plan adoption, 39 percent within the first 60 days, and 82 percent within six months). More negative returns following an insider sale indicate greater loss avoidance by the selling insider. As Gaming the System notes, such plans ''avoid significant losses and foreshadow considerable stock price declines that are well in excess of industry peers.''

[421] *Id.,* at pp. 2–3.

[422] *See* letters from Better Markets, NASAA, and Senator Warren et al.

access to MNPI before it is released. As another example, non-executive employees may obtain MNPI in the course of their employment.[423] To the extent that persons other than officers and directors are less likely to rely on Rule 10b5–1 for their trading, the discussed benefits would be attenuated.[424]

The application of the shorter cooling-off period to Rule 10b5–1 trading plans of persons other than officers and directors is intended to tailor the application of the most restrictive of the additional conditions of the affirmative defense in a way that balances the additional costs to insiders with the investor protection benefits. Directors and Rule 16a–1(f) officers, who will be subject to the longer cooling-off periods under the final amendments, are generally more likely than other insiders (1) to be involved in making or overseeing corporate decisions about whether and when to disclose information; and (2) to be aware of MNPI.[425] In addition to these risk considerations, the shorter cooling-off period for non-officer-and-director insiders recognizes that a longer cooling-off period might impose disproportionate costs on those insiders, who may be less highly compensated or face greater liquidity needs.

ii. Officer and Director Certifications

The amendments require that, as a condition of the amended Rule 10b5–1(c)(1) affirmative defense, officers and directors include certain representations in their trading plan. In a change from the proposal, to eliminate any additional burden that separate documentation may create,[426] the final amendments require the certification to be included in the plan documents as a representation. This approach would continue to reinforce directors' and officers' cognizance of their obligations with regard to MNPI.

The certification requirement is expected to incrementally benefit investors by reinforcing officers' and directors' cognizance of their legal obligation not to trade or adopt a trading plan while aware of material nonpublic information about the issuer or its securities. As a result, we expect the certification will reinforce investors' confidence that the officers and directors who make such certifications are not trading on the basis of information derived from their position, and also generally improve investor confidence in the securities markets.[427] This requirement, on the margin, is expected to act as an additional deterrent to officer and director trading based on MNPI through Rule 10b5–1 plans. Because the application of cooling-off periods to officer and director Rule 10b5–1 plans increases the likelihood that any MNPI becomes stale by the time trading commences, the benefits of the certification provision are expected to be greatest in instances where officers and directors have MNPI with a longer time horizon than the cooling-off period (for example, MNPI related to future corporate transactions or longer-term earnings forecasts). The benefits of this provision may be smaller if officers and directors already abstain from adopting Rule 10b5–1 plans while aware of MNPI (for example, as a result of robust insider trading policies and procedures or strong internal corporate governance controls). The incremental benefits of this provision may also be smaller in cases where officers and directors already make similar representations to broker-dealers that administer Rule 10b5–1 plans as part of existing industry practices.[428] Nevertheless, because such practices may not be universal, and the requirement may differ among the various broker-dealers that do require such representations, requiring these representations in the Rule 10b5–1 plan documents will likely have incremental benefits for investor confidence that the officer or director in fact is not aware of MNPI at the time of the representations.

iii. Restricting Multiple Overlapping and Single-Trade Rule 10b5–1 Trading Arrangements

A new condition to the affirmative defense will restrict the use of multiple overlapping Rule 10b5–1 plans for the open-market trades of persons other than the issuer. The restriction on multiple overlapping plans, which was supported by several commenters,[429] is expected to reduce the likelihood that insiders enter into multiple, overlapping plans and selectively cancel some of the plans at a later time based on MNPI, while availing themselves of Rule 10b5–1(c)(1)'s affirmative defense.[430] The effects of this provision may be modest to the extent that companies may already prohibit multiple Rule 10b5–1 plans,[431] or to the extent that companies may allow a trading plan not reliant on Rule 10b5–1(c)(1) to exist in conjunction with a trading plan reliant on Rule 10b5–1(c)(1).[432]

The restriction on the availability of the affirmative defense for multiple

[423] *See, e.g.,* letter from NASAA (stating that ''other corporate insiders and lower-level employees can also have access to such [material nonpublic] information''). Separately, prior research provides some evidence of information advantages of rank-and-file employees. *See, e.g.,* Ilona Babenko & Rik Sen, *Do Nonexecutive Employees Have Valuable Information? Evidence from Employee Stock Purchase Plans,* 62 Mgmt. Sci. 1843 (2016); Steven Huddart & Mark Lang, *Information Distribution within Firms: Evidence from Stock Option Exercises,* 34 J. Acc. Econ. 3 (2003); Kenneth Ahern, *Information Networks: Evidence from Illegal Insider Trading Tips,* 125 J. Fin. Econ. 26, Table 4 (noting insider trading by some lower-level employees). As an important caveat, these studies focus on data outside of Rule 10b5–1 plans. *See also infra* note 424.

[424] The current reporting regime impairs our ability to obtain comprehensive data on the use of Rule 10b5–1 plans by other insiders, including non-executive employees. According to a 2021 industry survey, only three percent of respondents required the use of Rule 10b5–1 plans for ''other insiders'' (insiders besides the C Suite and the board of directors) while an additional seven percent strongly encouraged it and 85 percent of respondents permitted it. By comparison, 13 percent of respondents required Rule 10b5–1 use and 28 percent strongly encouraged it for trading by the C Suite while six percent required Rule 10b5–1 plan use and 23 percent strongly encouraged it for trading by the board of directors. The survey also found that 77 percent of respondents that allowed other insiders to enter Rule 10b5–1 plans did not impose limitations on the ability of ''other insiders'' to enter Rule 10b5–1 plans, while the remainder imposed some limitations (*e.g.,* allowing only employees at a certain level or from certain departments to enter such plans or imposing another limitation). The survey also found that at close to a third of respondents, the usage of Rule 10b5–1 plans by ''other insiders'' had increased in the prior two years. *See* SCG 2021 Survey. As a caveat, the survey contained a relatively small number of responses and had a high representation of large, more established public companies and thus the survey findings discussed above need not be representative of Rule 10b5–1 plan practices at all affected companies.

[425] *See, e.g.,* Mavruk & Seyhun, *supra* note 19, at 179; *see also* letters from CII and Cravath.

[426] *See supra* note 132.

[427] *See United States* v. *O'Hagan,* 521 U.S. 642, 658–59, 117 S. Ct. 2199, 2210, 138 L. Ed. 2d 724 (1997).

[428] *See supra* note 132.

[429] *See supra* notes 153 and 154 and accompanying text. *But see supra* note 166.

[430] As a result, the benefit of strategically canceling an existing plan based on MNPI will be significantly reduced for many insiders. An insider that cancels a plan will be subject to disclosure obligations. This provision is expected to work in tandem with cooling-off periods, which will apply to any new plan and a modified plan that falls within the meaning of new Rule 10b5–1(c)(1)(iv), making a strategically planned cancellation significantly less attractive for insiders that plan to continue trading. Therefore, insiders will not be able to effectively shorten or circumvent the applicable cooling-off period by setting up multiple plans covering a similar period.

[431] A 2016 industry survey found that 82 percent of respondents do not allow multiple, overlapping Rule 10b5–1 plans. *See* Morgan Stanley & Shearman & Sterling LLP, *supra note* 384. A 2021 industry survey found that 52 percent of respondents do not allow multiple, overlapping Rule 10b5–1 plans. *See* SCG 2021 Survey. The data is based on the responses of the surveyed public company members of the Society of Corporate Secretaries and Governance Professionals in the respective survey years and may not be representative of other companies.

[432] *But see infra* note 441 and accompanying text. Also, trading under a plan not reliant on Rule 10b5–1 could entail additional legal costs and limitations.

overlapping trading arrangements will not apply to plans not involving open-market transactions, such as, for example, employee benefit plans, ESOPs, or DRIPs. This is expected to preserve the benefits of flexibility for participants in such plans, which may be less likely to be associated with MNPI-based trading but impractical or costly to consolidate with an open-market Rule 10b5–1 plan.

In a modification from the proposal, trades in different classes of securities will not be excepted from the restriction on multiple overlapping Rule 10b5–1 plans. While different classes of securities may differ in the specific voting and cash flow rights they confer to the insider, as noted by a commenter,[433] MNPI is likely to have the same directional effects on potential insider trading profits. Therefore, applying the multiple overlapping plan restriction across all classes of securities is expected to result in greater investor protection benefits.

In a modification from the proposal, the restriction on multiple overlapping plans will not apply in certain circumstances involving plans with more than one broker dealer or other agent, as discussed in Section II.A.3.c above. This change is expected to preserve flexibility for insiders to rely on multiple financial intermediaries, with whom they may have previously established relationships or from whom they may obtain better financial terms. The final amendments also contain a modification to the multiple-plan restriction that permits an insider to maintain two separate Rule 10b5–1 plans at the same time so long as trading under the later-commencing plan is not authorized to begin until after all trades under the earlier-commencing plan are completed or expire without execution. This provision will preserve the ability of insiders to set up two successive plans for open-market trading, which may better address their trading needs compared to the proposal. This provision would not be available for the later-commencing plan, however, if the first trade under the later-commencing plan is scheduled to begin during the ''effective cooling-off period'', which is expected to strengthen investor protection. Finally, in a modification from the proposal, the restriction on multiple overlapping plans will not apply to sell-to-cover transactions, which will preserve the flexibility for insiders to meet tax withholding obligations related to the vesting of equity compensation.

The amendments limit the availability of the affirmative defense in the case of single-trade Rule 10b5–1 trading arrangements to one such trading arrangement in the prior twelve-month period, which was generally supported by several commenters.[434] The limitation on single-trade Rule 10b5–1 trading arrangements is expected to reduce the likelihood that plan participants would be able to repeatedly profit from ''one-off,'' ad hoc trading arrangements based on previously undisclosed MNPI while availing themselves of the protections of the Rule 10b5–1(c)(1) affirmative defense.[435] The incremental benefit of this limitation may be somewhat attenuated if insiders relying on single-trade plans are largely driven by one-time liquidity needs, or if they are effectively deterred from using MNPI by other provisions also being adopted. Nevertheless, there could be a benefit to limiting the frequency of single-trade arrangements to the extent that some MNPI may remain undisclosed for periods longer than the cooling-off period. In a modification from the proposal, the limitation on single-trade Rule 10b5–1 trading arrangements will only apply to plans involving open-market transactions. Similar to the application of the restriction on multiple overlapping trading arrangements to plans involving open-market transactions, this provision is expected to preserve the benefits of flexibility for participants in such plans, which may be less likely to be associated with MNPI-based trading. In a further modification from the proposal, the limitation on single-trade Rule 10b5–1 trading arrangements will not apply to sell-to-cover transactions, which will preserve the flexibility for insiders to meet tax withholding obligations related to the vesting of equity compensation.

iv. The Amended Good Faith Condition

The amendments expand the good faith provision to specify that all traders must act in good faith with respect to a Rule 10b5–1 plan (and not just enter into such plans in good faith), as a condition to the availability of the affirmative defense. The expansion of the good faith condition was generally supported by various commenters and is expected to further deter potential insider trading as part of such plans.[436] As discussed in Section V.A above, a decrease in insider trading is expected to alleviate associated incentive distortions and generate benefits for investors. By making clear that insiders must act in good faith with respect to the plan, including with respect to any trading under the plan, the amendments may discourage insiders from attempting to evade the prohibitions of the rule by, for example, using their influence to affect the timing of a corporate disclosure to occur before or after a planned trade under a trading arrangement (one of the economic costs of insider incentive distortions due to insider trading discussed in Section V.A above).[437] The amendments are expected to strengthen investor protection by helping deter fraudulent and manipulative conduct throughout the duration of the trading arrangement.

3. Costs

The amendments will impose additional conditions on the use of the Rule 10b5–1(c)(1) affirmative defense. All else being equal, the conditions on the use of Rule 10b5–1 plans will make it more complicated for insiders to sell or buy shares under such plans. The conditions that impose additional barriers to sales of company stock under Rule 10b5–1(c)(1) are expected to result in decreased liquidity of the insider's holdings, including reduced ability to meet unanticipated liquidity needs (such as emergency or unplanned expenses), as well as potential constraints on portfolio rebalancing and achieving optimal portfolio diversification and tax treatment. Greater difficulty of selling shares under Rule 10b5–1 plans will impose illiquidity costs on insiders and may reduce the value of their

[433] *See* letter from NASAA. *See also* Roger M. White, *Insider Trading: What Really Protects U.S. Investors*? 55 J. Fin. Quant. Anal. 1305 (2020).

[434] *See supra* notes 152 and 155 and accompanying text; *see also supra* note 156.

[435] For instance, some suggestive evidence is presented in Gaming the System, *supra* note 20 (finding that, for single-trade plans, share prices decreased following insider sales under Rule 10b5–1). As a caveat, the data does not show the dates of all scheduled trades, only the dates of executed trades. Thus, some ''single-trade'' plans may be multi-trade plans in progress, or multi-trade plans with all but one trade cancelled. *See also* Milian (2016), *supra* note 392 (finding that sales under Rule 10b5–1 plans with few trades are associated with more negative subsequent returns than sales under plans with more trades). As a caveat, Milian (2016) does not specifically compare single-trade to multi-trade plans. Further, the number of trades in the plan is highly correlated with the duration of the plan in the study, which can make it difficult to isolate the effect of the number of trades in the plan. *But see supra* note 399 and accompanying text (citing letter from Anonymous, which asserts that some of the observed profitability of single-trade plans may be due to the greater reliance on limit orders). However, *see, generally, supra* note 401 (indicating that abnormal insider trading profits may still be present after consideration of the effect of limit orders on the data).

[436] *See supra* note 191.

[437] *See supra* note 368 and accompanying and following text.

compensation.[438] The final amendments may have relatively greater impacts on some insiders, for example, those with a lower net worth and limited means, who may suffer greater adverse effects from the trading restrictions in the event of liquidity needs. The tailored nature of the final amendments (including the application of shorter cooling-off periods to Rule 10b5–1 trading plans of persons other than officers, directors, or the issuer; the limitation of certification requirements to officers and directors; and the exceptions to the multiple-plan and single-trade plan restrictions) is expected to mitigate some of these costs. Shortening the cooling-off period for officers and directors relative to the proposal is expected to decrease some of the costs of the rule for officers and directors.

In general, the economic costs of the amendments to Rule 10b5–1(c)(1) may be partly mitigated by the voluntary nature of the Rule 10b5–1(c)(1) affirmative defense. Insiders who find the amended conditions to be too restrictive may elect not to rely on Rule 10b5–1(c)(1). For example, some insiders may elect to make more discretionary trades during open trading windows when they presumably do not possess MNPI, while others may adopt trading arrangements not reliant on amended Rule 10b5–1(c)(1). However, insiders that elect not to rely on Rule 10b5–1(c)(1) may incur additional costs, such as a potential increase in liability risk or cost of counsel to evaluate whether trades conducted pursuant to a plan not reliant on Rule 10b5–1(c)(1) or conducted without a trading plan are compliant with securities laws and regulations[439] and a potential decrease in flexibility to execute trades during pension blackout periods and any ''closed window'' periods that issuers may choose to impose.[440] As an important caveat, although the use of Rule 10b5–1(c)(1) is voluntary under Commission regulations, some companies' insider trading policies may require insiders to rely on Rule 10b5–1(c)(1).[441]

Faced with the additional conditions on the use of Rule 10b5–1 plans, some insiders may seek to reduce their holdings of company shares in general, such as by buying fewer shares (including potentially greater reluctance to take advantage of DRIPs), selling shares more quickly when eligible, and negotiating for cash pay in lieu of equity pay, to the extent feasible given companies' share ownership guidelines and compensation policies.[442] The amendments also will make it more difficult for insiders to purchase company shares if they wish to do so under a Rule 10b5–1 plan.[443] Reduced insider equity ownership may in turn affect incentive alignment between insiders and shareholders (to the extent such incentive alignment existed in the first place and was not undermined by existing agency conflicts discussed in greater detail in Section V.A above). In some cases, if insiders have sufficient bargaining power, insiders facing illiquidity risk may seek higher total pay to compensate for the trading restrictions.[444] Existing shareholders are expected to bear any costs incurred by issuers due to potential shifts in executive compensation in response to the new conditions of Rule 10b5–1(c)(1) (whether in the form of additional compensation for insiders, or changes in compensation structure that weaken insider incentives).

In the subsections below we discuss the individual costs these conditions could impose on affected plan participants. However, we also recognize that these provisions may interact with each other and further reduce the attractiveness of Rule 10b5–1 plans to prospective traders.

i. Cooling-Off Periods

We recognize that the cooling-off period condition for officers and directors will restrict their ability to purchase or sell shares pursuant to a Rule 10b5–1 plan for the duration of the cooling-off-period, imposing potentially significant costs on officers and directors who seek to utilize the Rule 10b5–1(c)(1) affirmative defense, as indicated by various commenters.[445] As a result, some insiders may choose not to rely on a Rule 10b5–1 plan for future trading.[446] A long cooling-off period may discourage insiders from adopting Rule 10b5–1 plans and therefore result in larger, more concentrated volumes of insider-directed trades taking place during open-window periods rather than being spread out over the duration of the Rule 10b5–1 plan, which could lead to increased market volatility, as

[438] *See* Lisa Meulbroek, *The Efficiency of Equity-Linked Compensation: Understanding the Full Cost of Awarding Executive Stock Options,* 30 Fin. L. Mgmt. 5 (2001); *see also infra* note 442 and accompanying and following discussion.

[439] In addition, Form 4 must be filed before the end of the second business day following the day on which the transaction was executed. Rule 16a–3(g)(2)(i) indicates that for transactions that satisfy Rule 10b5–1(c), the date of execution is deemed to be the date on which the executing broker notifies the reporting person of the execution of the transaction.

[440] For example, trading under a Rule 10b5–1 plan is one of the exceptions from the blackout periods imposed in Section 306 of SOX. Section 306(a)(1) of SOX makes it unlawful for a director or officer of an issuer of any equity security, directly or indirectly, to purchase, sell or otherwise acquire or transfer any equity security of the issuer during a pension plan blackout period with respect to the equity security, if the director or executive officer ''acquires such equity security in connection with his or her service or employment as a director or executive officer.'' Section 306(a)(2) permits an issuer, or a security holder of the issuer on its behalf, to bring an action to recover any profits realized by a director or executive from a transaction made in violation of Section 306(a)(1). Rule 101(c)(2) of Regulation BTR [17 CFR 245.101(c)(2)] provides an exemption from Section 306(a)(1) for transactions made pursuant to a trading arrangement that satisfies the affirmative defense conditions of Rule 10b5–1(c). Officers and directors trading other than under a Rule 10b5–1 plan would not get this benefit.

[441] As noted above, a 2016 industry survey found that 17 percent of surveyed companies required the use of Rule 10b5–1 plans for trading. *See* Morgan Stanley & Shearman & Sterling LLP, *supra* note 384. A 2021 industry survey found that 13 percent of respondents required the C Suite, while six percent required directors to use Rule 10b5–1 plans for trading. *See* SCG 2021 Survey. We recognize that the number of companies with such policies in place may decrease after the rules become effective.

[442] Compensation committees may continue to award incentive pay even if insiders may prefer to reduce exposure to the issuer's equity. *See, e.g.,* Darren T. Roulstone, *The Relation Between Insider-Trading Restrictions and Executive Compensation,* 41 J. Acct. Rsch. 525 (2003) (showing that firms restricting insider trading ''use more incentive-based compensation and their insiders hold larger equity incentives relative to firms that do not restrict insider trading''). Companies may also impose share ownership guidelines and holding requirements. *See, e.g.,* Bradley W. Benson et al., *Stock Ownership Guidelines for CEOs: Do They (Not) Meet Expectations*?, 69 J. Banking Fin. 52 (2016); *see also Executive Stock Ownership Guidelines,* Equilar (Mar. 9, 2016), *available at https://www.equilar.com/reports/34-executive-stock-ownership-guidelines.html* (finding that the percentage of Fortune 100 companies that disclose ownership guidelines or holding requirements in any form was 87.6 percent in 2014); John R. Sinkular & Don Kokoskie, *Stock Ownership Guideline Administration,* 2020 Harv. L. School Forum Corp. Gov. (June 11, 2020), *available at https://corpgov.law.harvard.edu/2020/06/11/stock-ownership-guideline-administration/;* NASPP, 5 Trends in Stock Ownership Guidelines, (Dec. 15, 2020), *available at https://www.naspp.com/blog/5-Trends-in-Stock-Ownership-Guidelines* (finding that ''[e]ighty-five percent of respondents to the 2020 survey currently impose ownership guidelines on executives'').

[443] However, the likelihood of choosing a Rule 10b5–1 plan for a purchase is much lower than the likelihood of electing to use Rule 10b5–1(c)(1) for a sale (with the caveats about data availability). One study noted that approximately 2.3 percent of purchases versus 22.4 percent of sales were reported to be undertaken using Rule 10b5–1 plans. *See* Mavruk & Seyhun, *supra* note 19.

[444] *See* Darren T. Roulstone, *The Relation Between Insider-Trading Restrictions and Executive Compensation,* 41 J. Acct. Rsch. 525 (2003) (finding that ''firms that restrict insider trading pay a premium in total compensation relative to firms not restricting insider trading, after controlling for economic determinants of pay.''); *see also* M. Todd Henderson, *Insider Trading and CEO Pay,* 64 Vand. L. Rev. 503 (2011) (finding that ''executives whose trading freedom increased using Rule 10b5–1 trading plans experienced reductions in other forms of pay to offset the potential gains from trading'').

[445] *See supra* note 52.

[446] *But see supra* note 441.

indicated by various commenters.[447] Insiders who sell shares without relying on a Rule 10b5–1 plan are likely to incur additional costs and limitations. The economic costs of decreased liquidity due to Rule 10b5–1 plan restrictions were discussed in detail in Section V.B.3 above.

In a change from the proposal, the cooling-off period for the Rule 10b5–1 plans of officers and directors was revised from 120 days to the later of (1) 90 days after the adoption of the Rule 10b5–1 trading plan or (2) two business days following the disclosure of the issuer's financial results for the completed fiscal period in which the plan was adopted (which need not exceed 120 days after adoption or modification of the plan). However, because trading during the three months following adoption of a Rule 10b5–1 plan, or around earnings announcements, is common based on available data summarized in Section V.B.1 above, the amendments are likely to reduce officers' and directors' ability to trade under Rule 10b5–1 plans compared to their trading today, resulting in potential costs to insiders.[448]

In another change from the proposal, in response to suggestions of several commenters,[449] the final amendments include 30-day cooling-off period as a condition of the affirmative defense for persons other than the issuer that are not officers or directors. We recognize that this change will result in additional costs for the affected persons, particularly those rank-and-file employees and other individuals that have a lower net worth and undiversified stockholdings and lack the resources and access to alternative liquidity sources to absorb unanticipated liquidity needs in the presence of the trading restrictions in the final amendments. Such costs are expected to be mitigated to a considerable extent by the shorter duration of the cooling-off period for persons other than officers, directors, or the issuer. Further, the costs relative to the baseline are expected to be potentially more modest to the extent that the 30-day duration of the cooling-off period is generally aligned with existing industry practices.[450] In the aggregate, such costs may be further alleviated to the extent that persons other than officers, directors, or the issuer may hold less stock or may be less likely to trade under Rule 10b5–1 plans.[451]

The final amendments are also adding new paragraph (c)(1)(iv) that states that a modification or change to the amount, price, or timing of the purchase or sale of the securities underlying a Rule 10b5–1 plan is treated as a termination of the plan and the adoption of a new plan, and to the extent that insiders seek to continue to rely on the affirmative defense, they would incur the costs associated with a new cooling-off period. Other types of changes to Rule 10b5–1 plans would not be treated as the adoption of a new plan and would not result in those potential costs generally in line with the comments received.[452]

ii. Officer and Director Certifications

The amendments introduce as a condition to the Rule 10b5–1(c)(1) affirmative defense a new requirement that directors and officers provide representation in the plan documents that, at the time of adopting a new or modified Rule 10b5–1 plan: (1) they are not aware of material nonpublic information about the issuer or its securities; and (2) they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade the prohibitions of Section 10(b) and Rule 10b–5. In a change from the proposal to eliminate any additional burden that separate documentation may create,[453] officers and directors will be required to include the certification in the plan documents as representations, rather than provide a separate certification to the issuer. The final rules also do not provide that officers and directors should retain the certification for ten years, as was originally proposed. These changes are expected to incrementally decrease the costs of compliance with the amendments and avoid any potential costs that issuers might have chosen to incur to develop systems or procedures to accept officer and director certifications.

The incremental costs of this provision may be small to the extent that officers and directors already avoid adopting Rule 10b5–1 plans while aware of MNPI (for example, due to robust policies and procedures related to officer and director trading or robust corporate governance controls). Further, insiders may already make representations to that effect to broker-dealers that administer the plans, as part of existing industry practices.[454] Nevertheless, we recognize that such representations to broker-dealers may not be universal in practice or uniform in substance today. We further recognize, consistent with the concerns of commenters, that the certification condition may result in increased costs for officers and directors, such as the cost of consulting with legal counsel to help them analyze whether they have MNPI and to comply with the certification requirement, which may in some instances deter officers and directors from relying on Rule 10b5–1(c)(1).[455] To the extent that officers and directors forgo Rule 10b5–1 plans due to the certification requirement, they may incur additional costs of trading outside of such plans (see V.B.3 above for a more detailed discussion). The associated costs could also lead officers and directors to potentially seek other compensation terms with less equity exposure, which may result in additional costs to the company and its shareholders.[456]

iii. Restricting Multiple Overlapping and Single-Trade Rule 10b5–1 Trading Arrangements

We are adopting the restriction on multiple overlapping Rule 10b5–1 trading arrangements for open-market

[447] *See supra* note 54.

[448] *See* Gaming the System, *supra* note 20; *see also supra* notes 379 through 381 and accompanying text. A 2016 industry survey examining Rule 10b5–1 plan practices at public companies found that 30 days was the most popular cooling-off period among their respondents (41 percent) and that for 77 percent of the respondents, the cooling-off period was 60 days or less. *See supra* note 384. A 2021 industry survey examining Rule 10b5–1 plan practices found that 51 percent of survey respondents had a cooling-off period of 30 days and 67 percent of respondents reported cooling-offs of 60 days or less. *See* SCG 2021 survey. Separately, because many issuers release financial results prior to the filing of a Form 10–Q or 10–K, the use of the filing of Form 10–Q or 10–K for purposes of identifying the date of the disclosure of a domestic issuer's financial results is expected to result in a longer minimum cooling-off period for the officers and directors of the typical issuer, compared to using the date of the issuance of a press release announcing earnings results, resulting in less flexibility for the affected officers and directors.

[449] *See supra* note 422.

[450] A 2016 industry survey found that 41 percent of respondents had a 30-day cooling-off period and an additional eight percent reported a cooling-off period exceeding 30 days. *See supra* note 384. A 2021 industry survey found that 51 percent of respondents had a 30-day cooling-off period and an additional 13 percent reported a cooling-off period exceeding 30 days. *See* SCG 2021 Survey. As a caveat, neither survey specifies whether the cooling-off periods varied depending on the type of insider. As a further caveat, survey respondents need not be representative of all affected companies. Several commenters identified 30 days as a common duration of the cooling-off period (similarly not noting whether prevailing industry practices with regard to cooling-off periods vary depending on the type of insider). *See supra* note 57 and accompanying text.

[451] *But see supra* note 424.

[452] *See supra* note 80.

[453] *See supra* note 132.

[454] *See supra* note 132.

[455] *See supra* note 131.

[456] *See supra* note 442 and accompanying and following text.

trades, with certain modifications. This restriction is expected to limit the affected plan participants' flexibility to use Rule 10b5–1 plans to purchase or sell their shares. In a change from the proposal, we are adopting modifications to this condition that address the use of multiple brokers in a Rule 10b5–1 plan and that permit an insider to maintain two Rule 10b5–1 plans at the same time in certain circumstances. These changes should decrease the incremental costs of the amendments by preserving some flexibility for insiders that plan to use a successive Rule 10b5–1 plan after the current Rule 10b5–1 plan expires but wish to set it up before the first plan concludes as well as for insiders that have established relationships with, or otherwise prefer to utilize, multiple brokers. In another change from the proposal which should further reduce the incremental costs for affected insiders, the restriction will not apply to sell-to-cover transactions. The effects of the multiple-plan restriction will be smaller for insiders that can anticipate and consolidate most upcoming open-market purchases and sales of securities into a single plan (*e.g.,* utilizing an algorithm-based strategy). As proposed, the restriction on multiple overlapping plans will apply only to plans involving open-market trades, which will enable insiders with purchases and sales planned, for example, as part of employee benefit plans, ESOPs, or DRIPs, and not involving open-market purchases or sales to avoid the cost of the requirement. In a modification from the proposal, trades in different classes of securities will not be excepted from the restriction on multiple overlapping Rule 10b5–1 plans, consistent with a commenter's suggestion.[457] Compared to the proposal, this modification is expected to limit flexibility for those plan participants that seek to implement independent purchase or disposition strategies for different share classes through separate, overlapping plans.

We recognize that the multiple-plan restriction will impose costs on affected insiders, as suggested by various commenters.[458] While some insiders may be able to meet different trading needs involving open-market purchases or sales with a single plan, or through the exceptions provided above for one successive plan, a plan executed by multiple brokers, and sell-to-cover transactions, other insiders will incur costs due to this restriction.[459] For example, insiders may have immediate liquidity or other trading needs involving open-market transactions at different points in time that are difficult to incorporate into a single plan, resulting in greater costs. Modifying a single existing plan based on updated trading needs will initiate a new cooling-off period, imposing costs on insiders in such cases. Nevertheless, the incremental costs of the multiple-plan restriction are expected to be limited for the affected insiders of companies that already disallow such plans today.[460] The incremental costs of the multiple-plan restriction are also expected to be smaller for the affected insiders of companies that allow trading arrangements that do not rely on Rule 10b5–1(c)(1) and do not require the use of Rule 10b5–1 for insider trades.[461] Nevertheless, as noted above, insiders that maintain trading arrangements not reliant on Rule 10b5–1(c)(1) may incur other costs.

The final amendments limit the number of single-trade Rule 10b5–1 trading arrangements to one such arrangement in any twelve-month period. As noted by several commenters, this limitation is expected to impose costs on the affected insiders.[462] This limitation will make it costlier for insiders with repeated sporadic or ad hoc liquidity needs to divest issuer equity holdings.[463] At the same time, the approach of limiting the number of single-trade Rule 10b5–1 plans in a 12-month period, rather than restricting them entirely, alleviates costs for insiders with occasional unexpected liquidity needs that seek to avail themselves of the affirmative defense for such a single-trade plan. This approach has the benefit of protecting investors from trades that run a higher risk of being opportunistically driven by MNPI, while still accommodating the liquidity needs of certain insiders. While it is possible that the same insider would experience multiple instances of repeated, ad hoc liquidity needs in a 12-month period that can only be met through a new single-trade Rule 10b5–1 plan and such an insider would lose flexibility under the final amendments, the likelihood of such successive unanticipated liquidity needs occurring within the same 12-month period is lower than that of a single occurrence of an ad hoc liquidity need, for which the final rule provides an exception. In a modification from the proposal, the limitation on single-trade Rule 10b5–1 trading arrangements will only apply to plans involving open-market transactions. Similar to the focus of the multiple-plan restriction on plans for open-market trades, tailoring the limitation on single-trade Rule 10b5–1 trading arrangements in this manner is expected to eliminate the cost of the requirement for insiders with plans not involving open-market purchases or sales. In a further modification from the proposal, the limitation on single-trade Rule 10b5–1 trading arrangements will not apply to sell-to-cover transactions, which will also help to mitigate costs of this provision by allowing insiders to sell shares to cover tax withholding obligations related to the vesting of equity compensation.

iv. The Amended Good Faith Condition

The amendments specify that a trader must act in good faith with respect to the plan as a condition to the continued availability of the affirmative defense. Consistent with the views of various commenters, this provision is expected to result in additional legal costs (such as the cost of legal counsel to aid in compliance with the requirement), ambiguity,[464] and risks for plan participants (namely, the risk of loss of the Rule 10b5–1(c)(1) affirmative defense if a trader is found not to have acted in good faith).[465] Some commenters also expressed the concern that the amended good faith provision may create an ''unintended incentive for directors or officers to consider their Rule 10b5–1 plans in connection with corporate actions long after establishing their plans.'' [466] If plan participants perceive the amended good faith provision as increasing the legal cost and risk associated with the use of Rule 10b5–1 plans, they may reduce their reliance on Rule 10b5–1 plans.[467]

[457] *See* letter from NASAA. *See also* Roger M. White, *Insider Trading: What Really Protects U.S. Investors*? 55 J. Fin. Quant. Anal. 1305 (2020).

[458] *See supra* note 167.

[459] *See* letter from SIFMA 3.

[460] *See, e.g., supra* note 431 and accompanying text (discussing restrictions on multiple overlapping plans). According to a 2016 industry survey, more than 80 percent of respondents do not allow multiple, overlapping Rule 10b5–1 plans. According to a 2021 industry survey, 52 percent of respondents do not allow such plans. *See* SCG 2021 Survey.

[461] *See supra* note 432 and accompanying text.

[462] *See supra* notes 157 through 162 and accompanying text.

[463] Single-trade plans appear to be common. Based on Washington Service data from Jan. 2016 through May 2020, *Gaming the System, supra* note 20, note that 49 percent of the 10b5–1 plans in their sample cover only a single trade. Using Washington Service data for a more recent period (Jan. 2, 2018 through Sept. 13, 2022), we estimate that single-trade plans constitute approximately 44 percent of plans during the time period examined. *See supra* Section V.B.1. The caveat about classification of plans as ''single-trade'' plans in the available data applies. *See supra* note 435.

[464] *See supra* note 196 and accompanying text.

[465] *See supra* notes 195 and 198.

[466] *See* letter from Chamber of Commerce 2; *see also* letter from Wilson Sonsini.

[467] *See supra* note 198.

4. Effects on Efficiency, Competition, and Capital Formation

We expect the amendments to reduce the improper use of Rule 10b5–1 plans by insiders with MNPI. This decrease in insider trading should also limit insiders' incentives to engage in inefficient corporate decisions associated with insider trading, which were discussed in Section V.A above. The effects of the rule on the efficiency of corporate investment and other decisions are not fully certain because the rule may induce insiders to adjust their holdings in response to the reduced liquidity and potentially lead companies to adjust incentive and compensation structure or other policies and practices in response to the rule.

Further, limiting insiders' ability to trade on MNPI would decrease the insiders' incentives to influence the timing and content of corporate disclosures. Timelier and higher-quality corporate disclosures would provide more information to investors, resulting in more informationally efficient share prices in the secondary market and more efficient allocation of investor capital across investment opportunities in their portfolio.

A reduction in insider trading may also benefit market efficiency.[468] For example, a lower risk of trading against an informed insider is expected to increase investor confidence and the willingness of market participants to buy, and trade in, the issuer's shares. This effect would indirectly make it easier for the company to raise capital from investors.

Finally, the amendments may affect competition. Decreasing the ability of insiders to trade on MNPI should weaken their competitive edge in trading, promoting competition among other investors in the market for the issuer's shares. A lower risk of an insider with a significant private information advantage trading the issuer's shares may strengthen the incentive of other market participants to trade the issuer's shares and compete in gathering and processing information about the company.

All of the effects described above would be weaker to the extent that some insiders may trade under non–Rule 10b5–1 trading arrangements or may trade without a plan. Whether the amendments prompt a large increase in insider trading under non-Rule 10b5–1 trading arrangements would depend, in part, on how burdensome insiders find the amendments and how company policies constrain insider use of MNPI in non-Rule 10b5–1 trading arrangements (including in response to the Item 408 disclosure requirements).

It is not clear if the amendments will result in meaningful competitive effects on the labor market. We are not exempting any categories of public companies from the amendments, which should reduce potential effects on competition for talent among public companies. We do not anticipate significant effects of the amendments on the competition for talent between public and private companies. While Rule 10b5–1(c)(1) amendments may make insider holdings of public company stock less liquid (as discussed in greater detail in Section V.B.3 above), holdings of public company shares will remain significantly more liquid than holdings of private company stock.

5. Reasonable Alternatives

The certification requirements will apply to officers and directors only, as proposed. Cooling-off periods (with the duration dependent on the type of insider) and restrictions on multiple overlapping plans and single-trade plans will apply to persons other than the issuer. The expanded good faith provision will apply to all persons who seek to rely on the Rule 10b5–1(c)(1) affirmative defense.

As an alternative, we could limit each of the provisions to officers only.[469] Compared to the amendments, this alternative would eliminate the costs of the rule (discussed in greater detail in Section V.B.3 above) for the exempted plan participants but increase the risk of insider trading by such plan participants. The latter effects may be smaller to the extent the exempted persons are less involved in making and overseeing corporate decisions or are less likely to be aware of MNPI, but that likely is not the case for directors. As another alternative, we could extend all of the Rule 10b5–1(c)(1) amendments, including the certification requirements and the longer cooling-off periods applicable to officers and directors, to all persons other than the issuer. Compared to the amendments, this alternative would subject additional persons other than the issuer, including employees, to the costs of all of the provisions of the rule (discussed in greater detail in Section V.B.3 above) but also decrease the risk of insider trading by such plan participants. The latter benefits may be smaller to the extent that persons other than the issuer that are not officers or directors are less involved in making and overseeing corporate decisions, may lack control or knowledge about the timing and substance of the issuer's disclosures, or are less likely to be aware of MNPI. The aggregate effects of all of the discussed alternatives, compared to the amendments, may also be smaller to the extent that Rule 10b5–1 plans may be most prevalent among officers (with the caveat about data availability).

Alternatively, rather than adding new conditions to the affirmative defense, we could rescind the Rule 10b5–1(c)(1) affirmative defense altogether.[470] Rescinding Rule 10b5–1(c)(1) would increase the costs for existing Rule 10b5–1 plan participants (such as the additional costs of legal counsel to determine whether trading arrangements, or trades not reliant on a trading arrangement, are compliant with the Exchange Act in the absence of the Rule 10b5–1(c)(1) affirmative defense). Rescinding the Rule 10b5–1(c)(1) affirmative defense would also increase the liability risk for insiders that continue to trade due to greater uncertainty about whether they have complied with Rule 10b–5 and subject insiders to additional limitations on trading (such as restrictions on trading during blackout periods). The associated costs of divesting stock in the absence of the affirmative defense would make insiders' holdings of stock less liquid and could further induce insiders to negotiate non-stock-based compensation.[471] Further, while rescinding Rule 10b5–1(c)(1) would eliminate Rule 10b5–1 plans, it would not affect the use of other trading arrangements by officers, directors, and companies. The potential for trading under non-Rule 10b5–1 trading arrangements or outside of plans may lead to an increase in insider trading, compared to the amendments. It also may increase investor effort to perform due diligence on non-Rule 10b5–1 trading arrangements and trades outside of plans to assess the risk of trading against an informed insider. Moreover, rescinding Rule 10b5–1(c)(1) may hinder issuers' efforts to develop and implement corporate governance practices for trading arrangements that comply with securities laws and regulations. We expect that the new Item 408 disclosure requirements, discussed in detail in Section V.C below, will partly mitigate incentives to engage in insider trading under all trading arrangements, including trading

[468] *See supra* note 362.

[469] With the caveat about data availability, where Rule 10b5–1(c)(1) use is reported, officers are far more likely to report trading under Rule 10b5–1 plans than directors.

[470] *See, e.g.,* letter from Better Markets.

[471] *See supra* note 442 and accompanying and following text.

arrangements that are not reliant on Rule 10b5–1(c)(1) under this alternative.

As another alternative, we could impose some, but not all, of the new conditions to the affirmative defense. This alternative would lower the aggregate costs of the rule and preserve greater flexibility than the amendments, decreasing the costs discussed in the case of each of the specific provisions. However, due in part to their expected synergy, this alternative would make the combined set of amendments less effective at curbing insider trading behavior under Rule 10b5–1.[472]

With respect to the cooling-off period for officers and directors, the Commission could adopt a shorter or longer cooling-off period.[473] A shorter cooling-off period for officers and directors (such as the 30-day minimum cooling-off period that the final amendments apply to persons other than the issuer that are not officers or directors) could reduce some of the costs of a cooling-off period and preserve greater flexibility for officers and directors, compared to the amendments, but it would increase the risk of officers' and directors' trading based on MNPI. Conversely, a longer cooling-off period for officers and directors (such as the 120-day minimum cooling-off period proposed for officers and directors) could increase costs to officers and directors and limit flexibility, compared to the amendments, but it may further decrease the risk of officers' and directors' trading based on MNPI. As another alternative, we could specify a minimum cooling-off period for officers and directors that extends one trading day past the filing or furnishing of the issuer's next earnings announcement covering at least one fiscal quarter (and not include a minimum 90-day cooling-off period for officers and directors).[474] Such a variable-length cooling-off period would, in most cases, be shorter than the cooling-off period for officers and directors under the final amendments. This alternative also would introduce much greater variability in the permissible duration of the minimum cooling-off period for officers and directors, which may require incrementally greater effort from investors seeking to evaluate the timing of officer and director trades. Compared to the final amendments, it would also not be as effective as the adopted approach in discouraging trading on MNPI that is not tied to quarterly results.[475] A more detailed discussion of the costs and benefits of a cooling-off period that would be magnified or reduced, respectively, under these alternatives is included in Sections V.B.2.i and V.B.3.i. The discussed effects of the alternatives would also depend on whether they differ from existing, voluntary cooling-off period practices of issuers.[476]

The final amendments include a 30-day cooling-off period for persons other than the issuer that are not officers or directors. As an alternative, the Commission could lengthen the cooling-off period or shorten the cooling-off period applicable to such persons. As another alternative, the Commission could eliminate the cooling-off period for persons other than the issuer that are not officers or directors (for instance, only applying cooling-off periods to officers and directors, as proposed). Including a longer cooling-off period for persons other than the issuer that are not officers or directors (such as the longer cooling-off period applicable to officers and directors) would increase the costs to the affected plan participants and limit their flexibility (as discussed in greater detail in Section V.B.3.i above), compared to the amendments, but it may further decrease the risk of the affected plan participants' trading based on MNPI. Conversely, shortening or eliminating the cooling-off period applicable to persons other than the issuer that are not officers or directors could reduce costs (discussed in greater detail in Section V.B.3.i above) and preserve greater flexibility for the affected plan participants, compared to the amendments, but it would increase the risk of the affected plan participants' trading based on MNPI. The effects of this alternative would be smaller than discussed to the extent that persons other than officers and directors may be less likely to trade under Rule 10b5–1.[477]

As an alternative to including the certifications of officers and directors in Rule 10b5–1 plan documents, we could provide for the certification to be made to the issuer in a separate document and retained for ten years, as proposed. Compared to the amendments, this alternative could result in incrementally greater costs for officers and directors, to the extent that they do not presently make representations separately to the issuer. This alternative also could result in additional costs for issuers to the extent that they decide to establish new processes and systems to accept officer and director certifications. In turn, due to the employer relationship between the issuer and its officers and the fiduciary relationship between the issuer and its directors, a condition that would require officers and directors to make a certification to the issuer under this alternative could be marginally more effective in reminding them of their existing obligations with respect to MNPI, compared to the amendments. The potential benefit of the alternative compared to the amendments would be decreased if officers and directors already comply with their MNPI obligations under the existing rule and market practices.

The amendments restrict the availability of the affirmative defense for multiple overlapping Rule 10b5–1 trading arrangements for open-market trades. As an alternative, we could allow multiple overlapping plans but limit their number (*e.g.,* to two or three), limit the provisions to no more than one plan pertaining to purchases and one plan pertaining to sales, or provide other exceptions. These alternatives could preserve greater flexibility, compared to the amendments, and lower costs for plan participants that have multiple accounts or trading arrangements through which they trade in the company stock. However, these alternatives could introduce greater complexity in companies' oversight of insiders' multiple overlapping plans and potentially present a greater risk of insider trading, compared to the amendments (to the extent not mitigated by the other provisions that we are

[472] As discussed in Section V.B.2 above, in particular, for officers and directors, the certification condition is expected to complement the effects of the cooling-off period, which, in turn, is expected to work in tandem with the exclusion of multiple overlapping plans from Rule 10b5–1(c)(1) to possibly prevent a portion of potentially opportunistic plan cancellations based on MNPI.

[473] *See supra* note 418 (discussing suggestions for three-month and four- to six-month cooling-off periods); *see also supra* note 384 and following text (noting that at over three-quarters of surveyed respondents, the cooling-off period was 60 days or less); *supra* note 56 (suggesting a 30-day cooling-off period); letter from Cravath (suggesting a cooling-off period of the later of (1) 45-days after the adoption of the Rule 10b5–1 trading plan and (2) the second trading day following the next publication of the issuer's financial results for a completed fiscal period); *supra* note 58 (suggesting a cooling-off period not exceeding 90 days); *supra* note 48 (supporting the proposed 120-day cooling-off period); letter from CII (recommending a cooling-off period of four to six months).

[474] *See* letter from Davis Polk.

[475] For example, one study finds that ''specific disclosures are associated with subsequent negative news events that may not be impounded in short-term earnings . . . approximately 25% of the specific-disclosure sample exhibits a single news event, not related to earnings, for which the three-day market-adjusted return falls between 10% and 75%, within an average 140 calendar days of disclosure. These news events include exchange-imposed stock trade suspension, drug trial failure, and announcement of the intent to acquire another firm.'' *See* M. Todd Henderson et al., *supra* note 19.

[476] *See supra* notes 379 through 384 and accompanying and preceding text.

[477] *But see supra* note 424.

adopting, including certifications, the amended good faith condition, cooling-off periods, and the disclosure requirements). In particular, the option to maintain multiple, overlapping plans concurrently facilitates the ability to selectively cancel one of the plans based on MNPI, without being subject to a cooling-off period with respect to the remaining plans' trades. The economic effects of this alternative may be less significant to the extent that companies already may disallow the use of multiple overlapping plans,[478] or allow these insiders to maintain both trading arrangements not reliant on Rule 10b5–1(c)(1) and Rule 105b–1 trading arrangements.

The amendments limit the availability of the affirmative defense in the case of single-trade Rule 10b5–1 plans of persons other than the issuer to one such trading arrangement in any twelve-month period. As an alternative, we could disallow single-trade trading arrangements under Rule 10b5–1(c)(1) altogether. Compared to the final rule, this alternative could marginally reduce the likelihood that plan participants would be able to profit from a ''one-off,'' ad hoc trade based on previously undisclosed MNPI while availing themselves of the protections of the Rule 10b5–1(c)(1) affirmative defense. However, the incremental benefit of this alternative, compared to the final rule, may be attenuated if insiders relying on single-trade plans once in a twelve-month period are largely driven by a one-time liquidity need or financial hardship, or if they are effectively deterred from using MNPI by other Rule 10b5–1 provisions. In turn, this alternative would also significantly limit the flexibility and impose additional costs on insiders with a legitimate one-time, ad hoc liquidity need, compared to the final rule.

C. Disclosure of Trading Arrangements and Policies and Procedures in New Item 408 of Regulation S–K and Mandatory Rule 10b5–1 Checkbox in Amended Forms 4 and 5

The new Item 408(a) of Regulation S–K will require quarterly disclosures, in Form 10–Q and Form 10–K, of the adoption or termination,[479] and the material terms of Rule 10b5–1 and non-Rule 10b5–1 trading arrangements by directors and Rule 16a-1(f) officers. In a change from the proposal, price terms are excluded from the scope of material terms required to be disclosed under Item 408(a). New Item 408(b) will require an issuer to file its insider trading policies and procedures as an exhibit to its annual report on Form 10–K, which will be linked in the exhibit index (as discussed in greater detail in Section II.B above). Similar requirements will apply to FPIs that file annual reports on Form 20–F via new Item 16J.[480] The new Item 408(a), 408(b)(1), and analogous Form 20–F disclosures are required to be tagged using a structured data language (specifically, Inline XBRL). As discussed in Section II.B.1.c above, in response to a recommendation by some commenters, at this time, we are not adopting the proposed rule to require corresponding disclosure regarding trading arrangements of the issuer.

In addition, we are amending Forms 4 and 5 to add a checkbox to indicate that a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5–1(c)(1) and require disclosure of the date of adoption of the trading plan. In a change from the proposal, we are not adopting the optional checkbox for non-Rule 10b5–1 plans.

1. Baseline and Affected Parties

The new Item 408(a) disclosure requirements regarding the adoption, modification, termination, and material terms of officer and director trading arrangements apply to annual and quarterly reports on Forms 10–K and 10–Q. During calendar year 2021, based on the analysis of EDGAR filings, we estimate that there were approximately 7,200 filers with annual reports on Form 10–K and/or quarterly reports on Form 10–Q or amendments to them.[481] The new Item 408(b) disclosure requirements regarding insider trading policies and procedures will apply to annual reports on Forms 10–K and proxy and information statements on Schedules 14A and 14C. Disclosure requirements similar to Item 408(b) will also apply to FPIs that file Form 20–F. During calendar year 2021, based on the analysis of EDGAR filings, we estimate that there were approximately 6,300[482] filers of annual reports on Form 10–K, proxy or information statements, or amendments to them, and, in addition, approximately 800 filers of annual reports on Form 20–F (or amendments to them).[483]

Item 408(a) requirements will affect all issuers whose officers or directors have Rule 10b5–1 or non-Rule 10b5–1 trading arrangements as well as all officers and directors whose trading arrangements will now be subject to public disclosure by the issuer.[484]

Item 408(b) requirements will affect all issuers subject to the requirements, as well as issuers, directors, officers, and employees that engage in trading subject to the disclosed policies and procedures.

The Rule 10b5–1 checkbox requirement will apply to all filers of Forms 4 and 5 (including officers and directors as well as other filers). During calendar year 2021, we estimate that there were approximately 54,000 such filers.[485]

2. Benefits

New Item 408 and Item 16J will benefit investors by providing greater transparency about officer and director Rule 10b5–1 and non-Rule 10b5–1 trading arrangements, as well as governance practices with respect to insider trading.[486] This enhanced transparency may enable better informed voting and investment decisions and more efficient allocation of investor capital. The timing of trading arrangement adoptions and terminations by officers and directors, as well as a description of the material terms of the trading arrangements, is expected to enhance the value of existing trade disclosures, aiding investors in obtaining a more accurate valuation of the issuer's shares and making more informed voting and investment decisions, as supported by various commenters.[487] These informational benefits should be considered in the context of the existing baseline (which includes partial revelation of information contained in officer and director trades as part of Section 16

[478] *See supra* note 431 and accompanying text.

[479] New paragraph (c)(1)(iv) states that any modification or change to the amount, price, or timing of the purchase or sale of the securities underlying a Rule 10b5–1 plan is a termination of such plan and the adoption of a new plan.

[480] The discussion in this section referring to Item 408(b) also extends to the economic effects of related amendments to Form 20–F that apply similar requirements to Form 20–F filers.

[481] The estimate excludes registered investment companies and asset-backed securities issuers, which will not be subject to the Item 408 disclosures.

[482] The difference between this number of filers of annual reports on Form 10–K, proxy or information statements, or amendments to them, and the above number of filers of annual reports on Form 10–K and/or Form 10–Q, or amendments to them, is largely attributable to the fact that, given that calendar year 2021 was an active year for initial public offerings, a number of new reporting issuers may have filed a Form 10–Q during 2021 but not a Form 10–K as it was not due until 2022.

[483] *See supra* note 481.

[484] *See supra* Section V.B.1.

[485] The estimate is based on filings of Forms 4 and 5 during calendar year 2021 in Thomson Reuters/Refinitiv insiders dataset (version retrieved June 27, 2022).

[486] *See supra* Section V.A.

[487] *See supra* note 209.

reporting).[488] Further, informational benefits of the Item 408(a) disclosure may be low to the extent that plan trades are motivated by liquidity needs and similar considerations rather than by MNPI (especially after the amendments to Rule 10b5–1, such as the cooling-off period condition, aimed to reduce potential for MNPI-based trading under such trading arrangements). Finally, in a change from the proposal, price terms will be outside the scope of the required Item 408(a) disclosure of the terms of trading arrangements. This change will reduce the informational benefits of Item 408(a) to investors, compared to the proposed amendments.

The requirement that these data points be tagged in a structured data language (specifically, in Inline XBRL) is expected to facilitate access to, and analysis of, the disclosures by investors, potentially leading to more useful and timely insights, consistent with the suggestions of several commenters.[489] In particular, structuring the disclosures about trading arrangements under Item 408(a) will enable automated extraction of granular data on such trading arrangements, allowing investors to efficiently perform large-scale analyses and comparisons of trading arrangements across issuers and time periods. Structured data on trading arrangements may also be efficiently combined with other information that is available in a structured data language in corporate filings (*e.g.,* information on insider sales and purchases of securities) and with market data contained in external machine-readable databases (*e.g.,* information on daily share prices and trading volume). The use of a structured data language is also expected to enable considerably faster analysis of the disclosed data by investors. Structuring the narrative disclosure on insider trading policies and procedures required under Item 408(b)(1) of Regulation S–K in Inline XBRL is expected to make it easier for investors to extract information from the disclosures about insider trading policies and procedures, compare these disclosures against prior periods, and perform targeted artificial intelligence and machine learning assessments of specific narrative disclosures about insider trading policies and procedures.

We expect these benefits to result from disclosure of terminations, changes in material plan terms, and adoptions of trading arrangements. A termination or a change in material terms of a prior trading arrangement may similarly convey information about the views of the officers or directors regarding the issuer's future outlook and share price. Further, the timing of trading arrangement adoptions or terminations, relative to the issuance of other corporate disclosures, may provide investors with valuable insight into potential insider trading under such trading arrangements, and thus associated conflicts of interest that may erode firm value. We expect such benefits from the disclosure of both Rule 10b5–1 and non-Rule 10b5–1 trading arrangements. Moreover, by drawing market scrutiny to the adoption and termination of trading arrangements, enhanced disclosure is expected to deter insider abuses of trading arrangements based on MNPI. This scrutiny is expected to reduce insider trading, benefiting investors and decreasing the economic costs and inefficiencies associated with insider trading, as discussed in Section V.A above. The described benefits may be low or not realized in cases of trading arrangements initiated to meet officers' and directors' liquidity needs or for other reasons unrelated to MNPI.

The requirement to provide disclosure regarding insider trading policies and procedures is expected to provide investors with valuable information about governance practices with respect to insider trading of issuer stock. It will allow investors to better understand the policies and procedures, if any, that guide issuers in which they invest and the conduct of officers, directors, and employees of those issuers and the issuers themselves, including whether, and if so, how, issuers adopt standards that are reasonably necessary to promote (i) honest and ethical conduct, including the handling of conflicts of interest, (ii) full, fair, and accurate disclosure in periodic reports, including the potential mitigation of pricing distortions from insider trading, and (iii) compliance with applicable government rules and regulations, including the prohibition on insider trading. The absence or presence, and the nature of, such policies and procedures can inform investors about the likelihood of use of MNPI by these parties and, thus, the likelihood of incurring the economic costs of insider trading discussed in Section V.A above. It will help investors better understand how issuers protect their confidential information—which ''qualifies as property to which the company has a right of exclusive use''—as well as guard against the misappropriation of that information.[490] Disclosure regarding insider trading policies and procedures could also aid shareholders' voting and investment decisions. Moreover, requiring this disclosure would provide greater consistency in disclosures across issuers to the extent that they already disclose this type of information. In addition, the anticipation of market scrutiny following mandatory disclosure may incentivize issuers without specific insider trading policies to implement such policies and procedures (with some issuers possibly converging to a standardized insider trading policy). Such revisions to insider trading policies are, in turn, expected to reduce the likelihood of insider trading and the associated economic costs discussed in Section V.A above, particularly at issuers with weaker governance practices with respect to insider trading.

The amendments adding a Rule 10b5–1 plan checkbox to Forms 4 and 5 will benefit investors by providing transaction-specific disclosures of sales and purchases under Rule 10b5–1 trading arrangements. The checkbox disclosure will allow investors easier and timelier access to information about trades under Rule 10b5–1. This information will enable investors to more comprehensively identify insider trading pursuant to Rule 10b5–1 trading arrangements, as well as provide greater consistency in the disclosure of Rule 10b5–1 trades. Today, the disclosure of a purchase or sale under a Rule 10b5–1 trading arrangement in Forms 4 and 5 is voluntary, resulting in a lack of consistent and comprehensive information about such trades. Making this checkbox mandatory will allow investors to more readily interpret information in Forms 4 and 5.

The mandatory Rule 10b5–1 checkbox disclosures, in combination with the quarterly disclosure regarding adoptions and terminations of officers' and directors' Rule 10b5–1 trading arrangements, will provide greater transparency to investors regarding the use of Rule 10b5–1 trading arrangements for trading, in line with the suggestions of several

[488] *See, e.g.,* letters from Sullivan and Wilson Sonsini (indicating that the proposed disclosures would be duplicative of the disclosures that would be required under the proposed disclosure amendments to Forms 4 and 5); *see also* letters from Cravath and Shearman (indicating that details of non-Rule 10b5–1 trades already are disclosed on beneficial ownership forms). While beneficial ownership forms contain information about individual trades, some of which pertain to Rule 10b5–1 transactions, the information required in new Item 408(a) is significantly more detailed and comprehensive, which is expected to provide information benefits to investors above and beyond those that could be obtained today from the analysis of Section 16 reports.

[489] *See supra* note 319.

[490] *See United States* v. *O'Hagan,* 521 U.S. 642, 654 (1997) (recognizing that the undisclosed misappropriation of MNPI in breach of a duty of trust and confidence is ''fraud akin to embezzlement'').

commenters.[491] Such information will provide investors with valuable context for interpreting other corporate disclosures in valuing the companies' shares and making informed voting and investment decisions. Because Forms 4 and 5 would continue to use a structured data language, investors could extract and analyze comprehensive information about trades under Rule 10b5–1 trading arrangements across multiple time periods, individuals, and issuers.

3. Costs

First, we consider the direct (compliance-related) costs of the disclosure requirements for insiders and companies. Such costs include preparing the disclosure and gathering the information required to comply with the new disclosure requirements. Such costs are expected to be lower for companies that already disclose some information about Rule 10b5–1 trading arrangements and insider trading policies and procedures. Officers and directors are likely to have information about the adoption, modification, termination, duration, and number of securities to be sold through their trading arrangements readily available and/or accessible. However, issuers may not be systematically collecting such information from officers and directors today.[492] In those cases, issuers will incur additional cost to establish processes and systems to collect information about officers' and directors' trading arrangements required to comply with the new Item 408(a) disclosure requirement.[493] Officers and directors will incur an incremental cost to follow internal processes their companies establish, if any, to gather information about officer and director trading arrangements for the Item 408(a) disclosure. Issuers are likely to have information about their insider trading policies and procedures required to comply with Item 408(b) readily available. The tasks of identifying, and preparing a disclosure of, such policies and procedures (and, for issuers without such policies and procedures, the reasons for not having them) are expected to result in some additional direct costs;[494] however, such costs are likely to be relatively small.[495]

In a modification from the proposal, the final rules do not require disclosure of the issuer's policies and procedures in the body of the annual report, proxy statement, or information statement. Instead, they require registrants to disclose whether they have adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of their securities by directors, officers, and non-executive employees or the registrant itself that are reasonably designed to promote compliance with insider trading laws, rules, and regulations, and any listing standards applicable to the registrant. If a registrant has not adopted such insider trading policies and procedures, it will be required to explain why it has not done so. These disclosures will be required in annual reports on Form 10–K and proxy and information statements on Schedules 14A and 14C. FPIs will be required to provide analogous disclosure in their annual reports on Form 20–F. Registrants will also be required to file a copy of their insider trading policies and procedures as an exhibit to their annual reports on Form 10–K or 20–F. If all of the registrant's insider trading policies and procedures are included in its code of ethics (as defined in Item 406(b)) and the code of ethics is filed as an exhibit pursuant to Item 406(c)(1), a hyperlink to that exhibit, accompanying the issuer's disclosure as to whether it has insider trading policies and procedures, would satisfy this component of the exhibit filing requirement. Requiring registrants to file their insider trading policies and procedures as an exhibit would facilitate investor access to the document as it would be available online through EDGAR and hyperlinked in the exhibit index. These modifications also may result in improved readability of the disclosure in the main body of the filing and incrementally facilitate compliance, compared to the proposed requirement to disclose the policies and procedures in the body of the filing.

The requirement to tag the new Item 408(a) and Item 408(b)(1) disclosures in Inline XBRL will impose incremental compliance costs on issuers. Such costs are expected to be modest, because issuers affected by the Inline XBRL requirements (including SRCs) are already required (or, in the case of certain business development companies, will be required no later than February 2023) to use Inline XBRL to comply with other disclosure obligations.[496] Moreover, the limited scope of the disclosure will likely require a relatively narrow-in-scope taxonomy of additional tags (compared to the significantly more extensive taxonomies used for financial statement disclosure tagging requirements), thus limiting the initial and ongoing costs of complying with the tagging requirement.

Next, we discuss the indirect costs of Item 408 and Item 16J. Indirect costs include potential reputational and investor relations costs associated with the disclosure. For example, issuers that have not implemented specific insider trading policies and procedures, as well as issuers at which the adoption, modification, or termination of officer and director Rule 10b5–1 and non-Rule 10b5–1 trading arrangements appears to correlate to the release of MNPI, may experience reputational and legal costs and a weakening of investor confidence in their corporate governance after public disclosure of this information. Relatedly, officers and directors that adopt, modify, or terminate a Rule 10b5–1 or non-Rule10b5–1 trading arrangement around the release of MNPI may also suffer reputational or legal costs from the public disclosure of this information. To the extent that the amendments to Rule 10b5–1(c)(1), such as the cooling-off period, eliminate or deter insider trading based on MNPI under Rule 10b5–1 trading arrangements, these legal and reputational costs of public disclosure may be minimal in cases of such trading arrangements.

The information in the domestic issuers' quarterly Item 408(a) disclosure of the material terms of officers' and directors' Rule 10b5–1 and non-Rule 10b5–1 trading arrangements, which may benefit investors and other market participants, may cause the affected officers and directors to incur costs to the extent that it reveals their future trading plans to other market participants—a concern expressed by various commenters.[497] The application of a cooling-off period may enable other market participants to obtain some

[491] *See, e.g.,* letters from ACCO, CII, Quinn, and Cravath.

[492] *See, e.g.,* letter from Sullivan (expressing concern that requiring disclosure of this information would impose a significant burden on issuers).

[493] *Id.*

[494] *See, e.g.,* letter from Dow (expressing concern about the administrative burden of the Item 408(b) disclosure requirement).

[495] The final amendments may impose higher additional costs on FPIs. Such additional costs would be relatively small to the extent an FPI already discloses similar information under its home country rules.

[496] *See Inline XBRL Filing of Tagged Data,* Release No. 33–10514 (June 28, 2018) [83 FR 40846, 40847 (Aug. 16, 2018)]; *Securities Offering Reform for Closed-End Investment Companies,* Release No. 33–10771 (Apr. 8, 2020) at 33318 [85 FR 33290 (Jun. 1, 2020)].

[497] *See supra* note 216.

information[498] about the timing and terms of the officer's or director's Rule 10b5–1 trading arrangement before trading begins, potentially enabling other market participants to incorporate this information in their own trading strategy before the officer's or director's trading arrangement may be executed. For Rule 10b5–1 trading arrangements relying on a simple trading strategy (*e.g.,* equally-sized, equally-spaced periodic transactions), the combination of the Item 408(a) disclosure and the Rule 10b5–1 checkbox on Form 4 may enable investors to gauge some information about the officer's or director's trading strategy. This could lead to a potentially less favorable price than the officer or director might otherwise have obtained because other market participants are reacting to the officer's or director's trading strategy.[499] Officers and directors may continue to use limit orders to partly insure against an unfavorable price impact of the Item 408(a) disclosure, if any. For planned trades motivated by liquidity needs and other considerations that do not involve MNPI (especially after the amendments to Rule 10b5–1 aimed to reduce potential for MNPI-based trading under such plans), the costs to officers and directors from the revelation of Item 408(a) information to market participants will likely be low. Moreover, such costs of Item 408(a) should be considered in the context of the baseline, under which officers' and directors' Form 4 filings already reveal some information about their trades to the market. Importantly, in a change from the proposal, the amendments exclude price terms of the trading arrangement from the scope of Item 408(a), which should significantly alleviate the potential costs to officers and directors.[500]

Finally, some issuers may implement new insider trading policies and procedures or update existing insider trading policies and procedures in anticipation of the Item 408(b) disclosure requirement and the potential public scrutiny of their policies and procedures, if any. Additional restrictions on insider trading arrangements adopted in anticipation of the public disclosure could result in economic costs for insiders and, in some instances, changes in insider compensation and insider equity holdings that reduce their exposure to issuer stock (broadly in line with the discussion of the potential indirect costs of restrictions on insider use of trading arrangements in Section V.B.3 above). Costs incurred by issuers would be borne by their existing shareholders.

Insiders are likely to have information about which of their trades were executed pursuant to a Rule 10b5–1 trading arrangement readily available, likely resulting only in small direct costs of providing checkbox disclosure and the date of adoption of the trading arrangement on Forms 4 and 5. Systematic identification of trades under Rule 10b5–1 trading arrangements on Form 4 under the amendments, combined with existing time frames for Form 4 reporting (and for officers and directors, the new disclosures in Item 408(a)), may enable some market participants to infer the likely trading strategy employed by the insider under a Rule 10b5–1 trading arrangement. While this information may benefit investors and other market participants, it may result in the indirect cost of information spillovers to market participants, which may contribute to an unfavorable price movement prior to the execution of all trades under the plan.[501] Such indirect costs will be lowest for insiders other than officers and directors given that they are not subject to Item 408(a) and for insiders who use Rule 10b5–1 trading arrangements largely for liquidity rather than due to information considerations (especially in conjunction with the amendments to Rule 10b5–1(c)(1) that reduce the potential for MNPI-based trades). Insiders that already voluntarily disclose Rule 10b5–1 use in their filings of Forms 4 and 5 will not incur these direct and indirect costs.

4. Effects on Efficiency, Competition, and Capital Formation

We expect the amendments to reduce the information asymmetry between insiders and outside investors by providing more granular and timelier detail about officers' and directors' trading arrangements and issuers' insider trading policies and procedures. The reduction in information asymmetry as a result of the additional disclosure would result in more informationally efficient stock prices. Because disclosure of directors' and officers' trading arrangements and insider trading policies and procedures can inform investors about insider incentives and governance practices, which could affect shareholder value as discussed in Section V.A above, the additional disclosure about trading arrangements and insider trading policies and procedures could also better inform investment decisions (enabling more efficient allocation of capital in investor portfolios) and shareholder voting decisions.

Importantly, we expect the amendments to draw market scrutiny to officers' and directors' Rule 10b5–1 and non-Rule 10b5–1 trading arrangements, decreasing the ability of insiders to trade on MNPI through such trading arrangements. As discussed in Section V.B.4 above, this potential scrutiny should reduce insiders' incentive conflicts associated with insider trading. In particular, it would decrease incentives for inefficient corporate investment decisions and other corporate decisions. Further, it would decrease insiders' incentives to influence corporate disclosures, resulting in timelier and higher-quality disclosures that enable more informationally efficient share prices and more efficient allocation of capital in investor portfolios.

A lower risk of trading against an informed insider is expected to increase investor confidence and the willingness of market participants to buy and trade in the issuer's shares. These effects would indirectly make it easier for the issuer to raise capital from investors. Issuers that disclose robust insider trading policies and procedures in particular may elicit greater investor confidence, as well as interest from investors seeking issuers with stronger corporate governance practices,

[498] The Item 408(a) disclosure is limited to whether any director or officer adopted or terminated a Rule 10b5–1 plan or non-Rule 10b5–1 trading arrangement and a description of its material terms, including the name of the officer or director, the adoption or termination date, plan duration, and the number of shares to be traded. Price terms are not required to be disclosed.

[499] However, the described effects may be modest due to the generally small size of individual officer and director trades. Further, even the revelation of large predictable planned trades may not result in front-running. *See* Hendrik Bessembinder et al., *Liquidity, Resiliency and Market Quality Around Predictable Trades: Theory and Evidence,* 121 J. Fin. Econ. 142 (2016) (showing, in a setting with large and predictable exchange-traded fund trades, that ''traders supply liquidity to rather than exploit predictable trades in resilient markets'' and not finding ''evidence of the systematic use of predatory strategies'').

[500] *See supra* note 218 (noting that various commenters expressed concerns that disclosure of pricing information and other details of a Rule 10b5–1 trading arrangement could impose costs on issuers and their insiders). *But see* letter from Quest (stating that the final rule should not require disclosure of the number of shares covered by a trading arrangement and the duration of the arrangement) and letters from Fenwick and Shearman (recommending that the required disclosures should be limited to the person adopting the plan, the date of adoption or termination, and duration). While we recognize that the volume and duration information may potentially be informative to other market participants, we expect the potential costs to officers and directors from the disclosure of such information to be modest in the absence of pricing information.

[501] *But see supra* note 499.

resulting in capital formation benefits for such issuers.

Finally, in line with the discussion in Section V.B.4 above, the amendments may affect competition. Decreasing the ability of insiders and issuers to trade on MNPI will weaken their competitive edge in trading, promoting competition among other investors in the market for the issuer's shares. A lower risk of an insider with a significant private information advantage trading the issuer's shares will strengthen the incentive of other market participants to trade those shares and compete in gathering and processing information about the issuer. Disclosure of insider trading policies and procedures will also enable investors to access and compare insider trading policies and procedures across issuers, potentially enhancing issuers' incentives to compete in, and establish a reputation for, having strong governance practices in the area of insider trading.

To the extent that the disclosure requirements impose a fixed cost on issuers, they would have a negative competitive effect on smaller issuers subject to the amendments and issuers that do not already provide disclosure regarding insider trading policies and procedures as well as Rule 10b5–1 and non-Rule 10b5–1 trading arrangements of their officers and directors. The final amendments defer by six months the date of compliance with the additional disclosure requirements for SRCs, [502] potentially mitigating some of the adverse competitive effects of the amendments. The Item 408(a) disclosure requirements will not apply to FPIs, potentially placing them at a relative competitive advantage to domestic filers.[503] With that exception, because the disclosure amendments will apply broadly across domestic public companies, generally, we do not anticipate it to result in meaningful competitive disparities in the labor market for executive talent.[504]

All of the effects described above will be smaller to the extent that some issuers already provide disclosure regarding their insider trading policies and procedures and the trading arrangements of their officers and directors today.

5. Reasonable Alternatives

The amendments require quarterly disclosure related to trading arrangements of officers and directors and disclosure of issuers' insider trading policies and procedures, if any, as an exhibit to their annual reports, proxy statements, and information statements. As an alternative, we could modify the scope and granularity of the required disclosure of officer and director trading arrangements or insider trading policies and procedures. The alternatives of expanding (narrowing) the scope of the disclosures required by new Item 408 could potentially provide greater (lesser) detail to investors, enabling better (less) informed investment decisions and more (less) accurate assessment of the risk of the use of MNPI for informed trading through trading plans compared to the amendments. However, the alternative of expanding (narrowing) the scope of the disclosure could also increase (decrease) disclosure costs (discussed in greater detail in Section V.C.3 above) compared to the amendments. As another alternative, we could permit the Item 408(b) requirement to be satisfied by posting the insider trading policies and procedures on the issuer's website, as suggested by some commenters.[505] Compared to the proposal, this approach could marginally ease compliance for issuers that prefer to post the material on their website rather than file it as an exhibit. However, compared to the proposal, this alternative would marginally increase investor effort required to access this information as the disclosure (including historical versions of the policies and procedures) would no longer be available online through EDGAR, and investors would not be able to follow a hyperlink directly to the EDGAR filing exhibit.

As another alternative to the quarterly disclosure related to trading arrangements, we could require a different frequency of disclosure. Requiring more (less) frequent disclosure under Item 408(a) would provide timelier (less timely) information to investors about trading arrangements but also impose higher (lower) costs on issuers and insiders. A more detailed discussion of the benefits and costs of the Item 408(a) disclosure is included in Sections V.C.2 and V.C.3 above.

As another alternative to the quarterly disclosure requirement, we could narrow its scope to include only Rule 10b5–1 trading arrangements, consistent with the suggestions of some commenters.[506] Under this alternative, officers and directors with non-Rule 10b5–1 trading arrangements would not incur the costs of the amendments (discussed in detail in Section V.C.3 above). However, investors would receive less information about their non-Rule 10b5–1 trading arrangements compared to the amendments. This effect on investors would be more pronounced in cases where officers and directors forgo Rule 10b5–1 trading arrangements in favor of non-Rule 10b5–1 trading arrangements as a result of the potential increased costs and complexity of Rule 10b5–1 trading arrangements under the amendments.[507]

As another alternative to the quarterly disclosure requirement, we could narrow or expand the scope of information required to be disclosed about trading arrangements as suggested by some commenters.[508] For instance, we could only require the disclosure of the dates of adoption or termination of the trading arrangement (and not require disclosure of the plan duration or the number of shares to be traded under the plan) or only require disclosure of the date of trading arrangement adoption. Alternatively, we could expand the scope of information required to be disclosed to include price terms of the trading arrangement, in line with the proposal. Under the alternative of narrowing (expanding) the scope of the information required to be disclosed, issuers that prepare the Item 408(a) disclosure, as well as officers and directors with trading arrangements subject to Item 408(a), would also incur

[502] Based on staff review of EDGAR filings for calendar year 2021, approximately 3,900 of the filers subject to the Item 408(a) amendments and 3,200 of the filers subject to Item 408(b) amendments are SRCs and thus will be eligible for the extended compliance date under the amendments.

[503] FPIs that file annual reports on Form 20–F will be subject to requirements similar to Item 408(b). Further, FPIs listed on U.S. exchanges will remain subject to insider trading laws and exchange listing standards.

[504] We do not expect significant effects on the labor market competition for executive talent between public and private companies. While the new disclosures will increase costs for public companies and, indirectly, their officers and directors, these amendments are likely to have only a marginal effect on the overall tradeoff of being an officer or director at a public company (including the liability risk and costs of public scrutiny of the insider's holdings, trades, and other actions).

[505] *See supra* notes 246 and 247.

[506] *See supra* note 222.

[507] Some commenters indicated, however, that Item 408(a) disclosure of non-Rule 10b5–1 trading arrangements would not be informative to investors. *See, e.g.,* letters from Cleary, Cravath, Shearman, and Simpson. While we agree that trades under such plans are subject to Section 16 reporting, Item 408(a) would require information about key material terms of such plans that cannot be obtained from examining Section 16 reports alone. Further, although non-Rule 10b5–1 officer and director trading arrangements by definition do not meet the conditions of the Rule 10b5–1(c)(1) affirmative defense, Item 408(a) disclosure of such plans can provide valuable additional insight to investors about the future trading plans of officers and directors (which, similar to Rule 10b5–1 plans can also be informative about officers' and directors' outlook on the issuer) and potentially inform investment decisions.

[508] *See supra* notes 219 through 221.

lower (higher) costs (discussed in detail in Section V.C.3 above), compared to the amendments. Specifically, narrowing (expanding) the scope of the disclosure under Item 408(a) could decrease (increase) information spillovers to investors and other market participants and potentially decrease (increase) the likelihood of unfavorable price movement based on such disclosure prior to the officer's or director's own trades, compared to the amendments. In turn, narrowing (expanding) the scope of the Item 408(a) disclosure could decrease (increase) the information benefits of the disclosure to investors, compared to the amendments. The described effects may be attenuated if officers or director trades under the trading arrangements subject to the Item 408(a) disclosure are driven mainly by liquidity rather than information considerations.

Item 408(a) and Item 408(b)(1) disclosures will be required to be tagged using a structured data language (specifically, Inline XBRL). Alternatively, we could forgo the tagging requirement (consistent with the suggestion of one commenter [509]) or narrow its scope, such as to cover only quarterly Item 408(a) disclosures. This alternative would provide incremental compliance cost savings for issuers, who would not be required to select, apply, and review Inline XBRL tags for the disclosure of whether they have insider trading policies and procedures in annual reports and proxy and information statements. Such cost savings, however, would likely be low given the very limited number of Inline XBRL tags that are expected to be needed to tag the new disclosures. This alternative would also remove the informational benefits to investors that would accrue from facilitating retrieval of such disclosures across issuers and time periods, compared to the amendments.

Item 408(a) disclosure requirements will only apply to domestic filers. Disclosure requirements regarding insider trading policies and procedures, however, will apply to both domestic filers (through Item 408(b)) and FPIs that file Form 20–F.[510] As an alternative, we could exempt Form 20–F filers from this disclosure requirement, as suggested by some commenters.[511] Generally speaking, such an exemption would eliminate the direct and indirect costs of the rule (as described in detail in Section V.C.3 above) for FPIs. Exempting Form 20–F filers also would decrease the amount of information available to investors about the insider trading incentives and policies and procedures at such issuers, potentially limiting investors' ability to make informed decisions with respect to such issuers. This exemption also could lead to incrementally greater competitive disparities due to the higher compliance burden of domestic issuers with respect to this requirement.

As another alternative, we could extend requirements similar to Item 408(a) requirements to FPIs that file annual reports on Form 20–F. Because such FPIs do not have a quarterly reporting obligation equivalent to a Form 10–Q, the incremental benefit of this alternative could be relatively more modest due to the less timely disclosure of information on trading arrangements, if it were required to be disclosed in annual reports.

In addition, as another alternative, we could exempt SRCs from the Item 408(a) requirement, as suggested by one commenter, [512] rather than defer the compliance date for SRCs. Compared to the amendments, this alternative would reduce the costs for SRCs, which may be disproportionately affected by the fixed component of the compliance costs (assuming any of the officers or directors have a trading plan reportable under this Item). However, this alternative also could prevent investors in such issuers from being able to evaluate trading plans and their material terms and potentially result in less informed voting and investment decisions, compared to the amendments.

The amendments to Forms 4 and 5 add a mandatory Rule 10b5–1 checkbox and require the disclosure of the date of Rule 10b5–1 plan adoption. As an alternative, we also could require this type of disclosure on Forms 4 and 5 for trades made under non-Rule 10b5–1 trading arrangements. This alternative could provide investors with more comprehensive information and greater transparency about trades under a broader range of trading arrangements. However, to the extent that non-Rule 10b5–1 trading arrangements can take various forms, requiring trades under such trading arrangements to be identified on Forms 4 and 5 separately from trades conducted without a trading arrangement under this alternative may provide less meaningful information to investors.[513]

D. Additional Disclosure of the Timing of Option Grants and Related Company Policies and Practices

The Commission is adopting new Item 402(x) of Regulation S–K to enhance the accessibility of information and transparency regarding issuers' grants of stock options, SARs, or similar option-like instruments before or after the filing of a periodic report, or the filing or furnishing of a current report on Form 8–K that contains MNPI. As proposed, the amendments would have applied to grants made during a period beginning 14 calendar days before and ending 14 calendar days after the MNPI filing (to include periodic reports on Forms 10–K or 10–Q, issuer share repurchases, or current reports on Form 8–K that contain MNPI). We are adopting the narrative disclosure requirement as proposed and the tabular disclosure requirement with several modifications. In a change from the proposal, partly in response to commenter feedback, [514] the amendments sharpen the focus of the new table on the data that can help investors evaluate the potential presence of spring-loading as well as tailor the trigger requirements and shorten the coverage window. The new table will apply only to grants made within a period starting four business days before and ending one business day after a triggering event. Further, the final rules remove from the scope of triggering events the share repurchase triggering event and provide that Forms 8–K disclosing the grant of a material new option award under Item 5.02(e) do not trigger this disclosure.[515] These changes are consistent with the suggestions of commenters to shorten the reporting window for the tabular disclosure and remove share repurchase as a triggering event.[516]

We believe that the modified coverage window will make the tabular disclosure more useful to investors

[509] *See supra* note 320.

[510] FPIs will be required to provide analogous disclosure in their annual reports pursuant to new Item 16J to Form 20–F.

[511] *See supra* note 249.

[512] *See* letter from MD Bar. Based on staff analysis of EDGAR filings for calendar year 2021, we estimate there are approximately 3,900 unique filers with annual reports on Form 10–K and/or quarterly reports on Form 10–Q or amendments thereto (excluding asset-backed securities issuers and registered investment companies, which will not be subject to the amendments).

[513] *See* letters from Cravath and Cleary (noting that the non-Rule 10b5–1 trading arrangement checkbox would not be informative to investors).

[514] *See supra* note 297.

[515] In a change from the proposal, issuer share repurchases will not trigger this disclosure, consistent with the suggestion of one commenter. *See* letter from Sullivan (noting that many issuers engage in repurchase activity regularly and, in some instances, daily, and that this requirement could pose a substantial burden on issuers without any potential benefit to investors). This change is expected to decrease the costs of the amendments relative to the proposal.

[516] *See, e.g.,* letters from Davis Polk and Cravath.

compared to the proposal, as discussed in Section II.C.3 above. By eliminating almost all of the post-filing period from the coverage window included in the proposal, the final amendments significantly reduce the potential noise in the tabular disclosure due to awards made after the release of MNPI intended as an effort to avoid spring-loading, rather than a strategic attempt at bullet-dodging.[517] Nevertheless, by extending the coverage window to one business day after the filing date, the final amendments account for potential spring-loading in cases where it may take the market an additional trading day to incorporate information in the triggering filing into share prices (*e.g.,* in the presence of MNPI filings made after trading hours [518] or by companies with a less liquid market for their shares). The asymmetry in the modified coverage window is intended to balance the costs to companies against the different likelihood of a grant being strategic (as opposed to a result of a general attempt to avoid grants while in possession of MNPI) if a grant is made before versus after the MNPI release. Overall, the modified coverage window will give investors easier access to data about option grants in the days leading up to and immediately following the MNPI filing. While we recognize that it may capture some grants made on the date following the triggering filing in an attempt to avoid spring-loading, such grants should generally be discernible by investors from the provided disclosure [519] and, on balance, this coverage window is more appropriately tailored, relative to the proposal. Overall, tailoring the tabular disclosure requirement in these ways is expected to enhance the benefits of the resulting disclosure to investors by improving its usability and including fewer details that could offer little information value for investors. These changes also should decrease the costs of the disclosure for issuers and affected NEOs compared to the proposal.

Finally, we are combining the two columns that would have reported the market value of the underlying securities on the trading days before and after the MNPI filing, respectively, into a single column with the percentage change in the market value of the underlying securities between the trading day before and after the MNPI filing. Compared to the proposal, this column is expected to incrementally make it easier for investors to understand the impact that spring-loading may have on the value realized by the NEOs, and somewhat condense the size of the new tabular disclosure without a meaningful effect on the cost to companies as the percentage change can be readily calculated from the market values in dollar terms for the two days.

1. Baseline and Affected Parties

New Item 402(x) will apply to filers of annual reports on Form 10–K and proxy and information statements.[520] During calendar year 2021, we estimate that there were approximately 6,300 affected filers.

Existing Item 402 requires disclosure of option grant dates, thus potentially enabling investors today to compare the timing of grant dates and historical filings of a periodic report or another EDGAR filing that contains MNPI. The Commission provided interpretive guidance regarding option grants in the 2006 Executive Compensation Release.[521] In considering the timing of option grants close in time to the release of MNPI, the Commission explained in the release that, if the issuer has such a program, plan, or practice, the issuer should disclose that the board of directors or compensation committee may grant options at times when the board or committee is aware of MNPI.[522] To the extent that the existing disclosures of issuers that allow the timing of option grants around MNPI reflect such guidance, the incremental effects of a mandate to disclose policies and procedures related to option grants close in time to MNPI may be small.

Some studies have noted that the regulatory reforms of the early and mid-2000s have led to the decline, if not disappearance, of questionable option timing practices.[523] However, there is evidence that strategic option grant timing persists.[524] For example, one study, which examined 4,852 scheduled CEO stock option grants from 2007 through 2011, found that managers accelerate bad news before a grant and delay good news until after a grant, consistent with self-interested attempts at strategic option grant timing that maximizes their value to the CEO, and that ''market reactions to SEC Form 8–K filings (which report material corporate events) tend to be negative in the months immediately before a scheduled CEO option grant and positive in the months after the grant.'' [525] Executives also appear to move earnings from the pre-grant period to the post-grant period, such as by changing a firm's accounting choices (*e.g.,* accruals management) and perhaps even by timing investments (*e.g.,* real earnings management).[526] Another study concluded that spring-loading partly replaced the disappearing practice of option backdating.[527] A different study documented spring-loading around stock splits but does not

[517] *See infra* note 564.

[518] *See, e.g.,* Henk Berkman & Cameron Truong, *Event Day 0? After-Hours Earnings Announcements,* 2009 **J. ACC. RES.** 71.

[519] For example, an investor reviewing the disclosure is unlikely to be concerned about grants made immediately after the triggering filing representing bullet dodging if the information in the triggering filing was not negative in nature or was not followed by much stock price movement or was instead followed by a share price increase.

[520] Current filing requirements of Form 10–K permit filers to incorporate by reference executive compensation disclosures from a proxy or information statement involving the election of directors. *See supra* note 252. These estimates exclude registered investment companies and asset-backed securities issuers, which are not subject to the amendments.

[521] *See* 2006 Executive Compensation Release, *supra* note 277.

[522] *Id.*

[523] *See* Randall Heron & Erik Lie, *What Fraction of Stock Option Grants to Top Executives Have Been Backdated or Manipulated?,* 55 Mgmt. Sci. 513 (2009); M. P. Narayanan & H. Nejat Seyhun, *The Dating Game: Do Managers Designate Option Grant Dates to Increase Their Compensation?,* 21 Rev. Fin. Stud. 1907 (2008); Lucian Bebchuk et al., *Lucky CEOs & Lucky Directors,* 65 J. Fin. 2363 (2010); Linxiao Liu et al., *Stock Option Schedules and Managerial Opportunism,* 41 J. Bus. Fin. Acct 652 (2014); Rik Sen, *The Returns to Spring-Loading,* 2008 N.Y.U. (Working Paper) (2008).

[524] *See Insider Trading and Stock Option Grants: An Examination of Corporate Integrity in the Covid-19 Pandemic,* Memo from FSC Majority Staff to Members, Committee on Financial Services, Sept. 17, 2020, *available at https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-20200917-sd002.pdf,* at pp. 2–5.

[525] *See* Robert M. Daines et al., *Right on Schedule:* CEO Option Grants and Opportunism, 53 J. Fin. Quant. Anal. 1025 (2018) (finding that: ''some CEOs have manipulated stock prices to increase option compensation, documenting negative abnormal returns before scheduled option grants and positive abnormal returns afterward;'' ''document[ing] several mechanisms used to lower stock price, including changing the substance and timing of disclosures;'' and further contend[ing] that such opportunism ''distorts stock prices, leading to capital misallocation, and may dissipate firm value if executives postpone valuable projects.'').

[526] *Id.; see also* David Aboody & Ron Kasznik, *CEO Stock Option Awards and the Timing of Corporate Voluntary Disclosures,* 29 **J. ACCT. ECON.** 73 (2000) (focusing on CEO option awards with fixed award schedules and showing that ''CEOs make opportunistic voluntary disclosure decisions that maximize their stock option compensation,'' based on changes in share prices, analyst earnings forecasts, and management earnings forecasts); Keith W. Chauvin & Catherine Shenoy, *Stock Price Decreases Prior to Executive Stock Option Grants,* 7 J. Corp. Fin. 53 (2001) (finding, in a May 1991 to Feb. 1994 sample covering 313 CEOs, ''a statistically significant abnormal decrease in stock prices during the 10-day period immediately preceding the grant date'' and concluding that ''[e]xecutives who expect to be granted stock options have the incentive, opportunity and ability to affect the exercise price with their inside information'').

[527] *See* Giulian Bianchi, *Stock Options: From Backdating to Spring Loading,* 59 Q. Rev. Econ. Fin. 215 (2016) (examining data through 2011).

disaggregate the 1992–2012 period into pre- and post-2006 sub–periods.[528]

2. Benefits

As discussed in Section II.C above, certain practices related to the timing of executive compensation option grants may raise investor concerns about the use of MNPI. Improved disclosure may potentially enhance the transparency of such compensation awards (informing investment and voting decisions) and potentially mitigate the economic costs of the associated incentive distortions, consistent with the suggestions of commenters that supported the proposed amendments.[529]

The amendments will make information that investors may seek to help them identify the occurrence and effects of potential spring-loading more salient and readily accessible. Spring-loading increases the effective economic value of the options granted to the executive upon MNPI becoming public.[530] Holding the number of the granted options and the policy to grant options with the exercise price equal to the current observable market price (*i.e.,* ''at-the-money'') constant, the executive would effectively receive a higher compensation award than if the timing of option grants were completely independent of MNPI releases.[531] Further, lowering an option's exercise price through timing of an option award around an MNPI release affects the sensitivity of the awarded options to changes in the issuer's share price.[532]

Some have argued that these practices may be the result of an optimal compensation policy.[533] Whether such practices constitute an optimal compensation policy or not, a lack of transparency about such compensation awards may limit investors' ability to fully gauge the key terms of compensation arrangements and their implications for executives' incentives and thus, potentially, firm value, and may limit shareholders' ability to make informed voting decisions. The amendments incrementally improve the accessibility of information about option grant timing practices. Item 402(x) will require additional disclosure regarding practices related to the awards of stock options, SARs, and similar option-like instruments to provide a more comprehensive picture of the timing of these awards relative to MNPI releases. New Item 402(x)(1) will require issuers to provide disclosure of their policies and procedures related to timing of these awards in relation to the disclosure of MNPI, which is not currently required. The tabular disclosure requirement of new Item 402(x)(2) will make information about such awards that are made shortly before MNPI releases more readily available to investors.

New Item 402(x)(3) will require issuers to submit this disclosure in Inline XBRL. This requirement is expected to offer incremental benefits to investors by facilitating automated extraction of the information for purposes of aggregation, analysis, and comparison (across time periods and filers), potentially enabling more informed investment and voting decisions. Even though investors can fairly readily extract the dates of MNPI disclosures and share prices around such MNPI disclosures respectively from EDGAR and third-party sources today, because option grant information in proxy statement disclosures does not use a structured data language, extracting such information from HTML filings for a large set of issuers requires additional cost and effort.[534]

We recognize that there may be various reasons, besides strategic spring-loading, for option grants within the specified number of days before disclosure of MNPI. Nevertheless, we believe that making this data more accessible to investors will help them analyze whether spring-loading is a concern as part of a comprehensive review of the various elements of compensation practices. Investors can then compare this information with the executive's on-the-job performance in assessing the optimality of executive compensation, which, will, on the margin, benefit investors by equipping them to make better informed voting and investment decisions. Combined with the narrative disclosure of the applicable policies, the tabular disclosure also may incrementally help to alleviate information asymmetries between issuers and investors with respect to this aspect of executive compensation practices and better inform investors about executives' incentives. Besides contributing to better informed voting and investment decisions, the disclosure may facilitate more informed shareholder say-on-pay votes and votes in director elections.[535]

Another potential benefit of the disclosure is that, to the extent that strategically timed option grants were

[528] *See* Erik Devos et al., *CEO Opportunism? Option Grants and Stock Trades around Stock Splits,* 60 J. Acct. Econ. 18 (2015). However, companies may adjust exercise prices to account for the effect of stock splits.

[529] *See supra* note 293.

[530] Past studies have focused primarily on options. In this context, the same economic effects can be expected in the case of awards of SARs and similar instruments. For purposes of this analysis, the term ''option'' includes stock options, SARs and similar instruments with option-like features.

[531] *See* David Yermack, *Good Timing: CEO Stock Option Awards and Company News Announcements,* 52 J. Fin. 449 (1997); *see also* Iman Anabtawi, *Secret Compensation,* 82 N.C.L. Rev. 835 (2004); Alex Edmans et al., Chapter 7—Executive Compensation: A Survey of Theory and Evidence, Handbook of the Econ. of Corporate Governance 383–539 (2017). They note that the use of ''stealth compensation'' is a ''challenge for the shareholder value view'' and that, in most cases, ''[i]f executive pay were efficiently designed and competitive, there would be no need to disguise it from shareholders... hiding these compensation elements from shareholders is suggestive of rent extraction.'' They further note that ''[s]tock options can be a means of camouflaging pay if directors or shareholders do not fully understand their cost'' and that opportunistic option timing practices ''are correlated with weak corporate governance.''

[532] Spring-loading can cause a call option to be in-the-money when it would have otherwise been at-the-money, assuming favorable MNPI is about to be released. Everything else equal, the value of an in-the-money call option has a higher sensitivity to the share price than the value of an at-the-money call. The effects of such changes depend on the objectives of the overall compensation package with respect to inducing optimal executive incentives and the role of option and SAR awards in this package.

[533] *See, e.g.,* Erik Devos et al., *supra* note 528 (stating that ''it is not clear whether shareholders are necessarily harmed by this apparent option grant timing, as it is possible that this is just another way by which the [board of directors] attempts to reward and retain a high performing CEO''); *see also Speech by SEC Commissioner: Remarks Before the International Corporate Governance Network 11th Annual Conference by Commissioner Paul S. Atkins,* U.S. Securities and Exchange Commission, July 6, 2006, *available at https://www.sec.gov/news/speech/2006/spch070606psa.htm. But see supra* note 531.

[534] Daily market prices can be obtained from a wide variety of sources, including commercial databases that provide such data for a subscription fee. Some commercial databases extract option grant information from proxy statements and provide it for a subscription fee, but they tend to focus their coverage on large companies. To obtain comprehensive option grant information for all NEOs of mid-size and small companies, investors would presently need to analyze or ''scrape'' (apply a computer algorithm to extract information from) a large number of proxy statement filings in the HTML format.

[535] *See, e.g.,* Glass Lewis, *2020 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice—United States,* 12–13, 41–42 (2020), *available at https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf. See also, e.g.,* Anabtawi, *supra* note 531 (stating that ''under state law fiduciary duty principles, a manager who receives stock options while in possession of inside information that will raise the stock price when it is later released discharges her fiduciary duty of loyalty through full disclosure to and ratification by a disinterested board. It is then the board's responsibility, pursuant to its fiduciary duty of disclosure, to inform the corporation's shareholders of the favorable timing of the grant, if it disseminates to them information about the company's executive compensation arrangements''); Matthew E. Orso, *'Spring-Loading' Executive Stock Options: An Abuse in Need of a Federal Remedy,* 53 St. Louis U. L. J. 629 (2009); Jonathan Tompkins, *Opportunity Knocks, But the SEC Answers: Examining the Manipulation of Stock Options Through the Spring-Loading of Grants and Rule 10b–5,* 26 Wash. U. J. L. & Pol'y 413 (2008).

not the result of a value-maximizing compensation policy but rather an outcome of agency conflicts (such as executives' attempts to extract additional compensation without drawing investor scrutiny to the full amount of such compensation),[536] and to the extent that companies forgo such grants in anticipation of the additional disclosure, the disclosure requirement may improve shareholder value. However, if the extra compensation is currently optimally awarded, forgoing such compensation could negatively impact shareholder value.[537]

Further, to the extent that the practice of strategically timed option grants in some instances created incentives for executives to change the timing and content of MNPI disclosures around option grant dates in an attempt to increase the economic value of compensation awards,[538] the amendments may partly mitigate such incentives. In those instances, the indirect effect of the amendments may improve the information content, timeliness, and quality of disclosures and result in more efficient share prices and better informed voting and investment decisions.

We recognize that several factors may potentially limit the magnitude of these economic benefits. First, the economic benefits of the amendments are likely to be modest because the information required by the new tabular disclosure can be obtained from other sources today. In particular, the benefits of the new tabular disclosure will be limited by the fact that investors today can research and assess, based on historical option grant dates already required to be disclosed under Item 402, how grant timing relates to EDGAR filings containing MNPI and to share price changes around such filings (information that is publicly accessible but not all found in one location), as indicated by various commenters.[539] The new disclosure will aggregate this information in a more readily accessible tabular format in one location, potentially incrementally lowering investor search costs and increasing investor awareness of option grant timing around MNPI. The Inline XBRL tagging requirement also is expected to further facilitate automated extraction of the information for purposes of aggregation, analysis, and comparison across time periods and filers.

Second, the discussed benefits may also be limited to the extent that issuers are already disclosing similar information today.

Third, the discussed benefits may be attenuated if some investors find the new tabular disclosure to be of limited use. For example, some investors may find the tabular disclosure difficult to parse for issuers with multiple filings containing MNPI and option awards. As another example, investors may find that the information value of the disclosure is diminished due to confounding events that occur between the option grant date and the dates of MNPI filings within the reporting window; however, the considerable narrowing of the reporting window from the proposal should partly alleviate this potential limitation. Investors in issuers with thinly traded securities may find that the percentage change in the market value of the underlying securities on the trading day following the MNPI disclosure, relative to the trading day before the MNPI disclosure, may not fully capture the effects of the MNPI disclosure. Some other investors may find that the information value of the disclosure is diminished due to market- or sector-wide events that may affect the issuer's share price on some MNPI filing dates, notwithstanding the substance of the MNPI that was disclosed. Further, some issuers may issue these awards shortly prior to MNPI filings due to pure coincidence rather than strategic reasons, as noted by some commenters.[540] For instance, several commenters noted that the timing of equity awards may be based on a meeting schedule established several months in advance without consideration of disclosure of MNPI.[541] Further, issuers that routinely award options on a specified schedule (*e.g.,* monthly or quarterly) may have grants within the reporting window of the new disclosure simply due to their obligations to file quarterly reports or to report current events on Form 8–K.[542]

New Item 402(x)(1) will require annual disclosure of policies and practices related to option grant timing close in time to the release of MNPI and will offer new information that is not presently available to investors. The disclosure of the presence or absence of such policies and practices may inform investment and voting decisions. The anticipation of public disclosure may also lead issuers to adopt policies and practices disallowing option grants around MNPI, leading to the benefits discussed above. To the extent such disclosures already are provided by issuers in light of the 2006 Executive Compensation Release,[543] such indirect benefits incremental to the amendments would be diminished.

A few other potential considerations may limit the economic benefits of the new disclosures (both in Items 402(x)(1) and 402(x)(2)). First, shareholders of some issuers may view the described option granting practices as an optimal compensation policy set by the board.[544] Second, the discussed benefits of the amendments are expected to be modest at issuers that rely less on stock options and primarily or exclusively grant restricted stock or do not grant equity-linked compensation.[545] Third,

[536] One article notes that ''[t]here are, of course, constraints that check the extent to which the level and structure of executive compensation can deviate from what would be optimal for shareholders. . . To circumvent such pressures, managers will want to enhance their compensation as discreetly as possible. By 'camouflaging' elements of their pay, managers can maximize their compensation while minimizing adverse reaction. Timing option grants is an especially attractive way to enhance executive compensation both because it is difficult to detect and because it has generally eluded attention.'' *See, e.g.,* Anabtawi, *supra* note 531; *see also, e.g.,* Bianchi, *supra* note 527 (stating that ''[o]pportunistic option timing is found to be associated with weaker corporate governance. Indeed, practices such as backdating and spring loading raise governance concerns. . . Eventually, the opportunistic option timing casts doubt on the efficacy of incentives to address the principal agent models.''); *see supra* note 294.

[537] *See, e.g.,* Tompkins, *supra* note 535; *see also supra* note 533. *But see supra* note 531.

[538] *See supra* note 526 and accompanying and following text.

[539] *See supra* note 298.

[540] *See supra* note 299.

[541] *See supra* note 300. Nevertheless, even if the grant schedule dates are set in advance, to the extent that some investors may be concerned about strategic management of MNPI disclosures around such pre-scheduled grants, the tabular disclosure may help investors more readily access information as they evaluate such occurrences. *See* Daines et al. (2018), *supra* note 525.

[542] *See supra* note 301.

[543] *See* 2006 Executive Compensation Release, *supra* note 277.

[544] *See supra* notes 533 and 537 and accompanying and following text. *But see supra* note 531.

[545] The proportion of companies that grant options to executives has declined substantially after the introduction of FAS 123R in 2004 (now codified in Accounting Standards Codification Topic 718). *See, e.g., Prevalence of Options Decreases as Companies Tie Awards to Performance,* Equilar (Aug. 23, 2018), *available at https://www.equilar.com/press-releases/103-prevalence-of-options-decreases-as-companies-tie-awards-to-performance;* Aubrey Bout et al., *S&P 500 CEO Compensation Increase Trends,* 2020 *Harv. L. School Forum Corp. Gov.* (Feb. 11, 2020), *available at https://corpgov.law.harvard.edu/2020/02/11/sp-500-ceo-compensation-increase-trends-3/.* Based on the analysis of Execucomp data for fiscal year 2021 (version retrieved on June 27, 2022), approximately 34 percent of companies reported option grants. Execucomp data covers S&P 1500 companies and thus may not be representative of option compensation at smaller companies. Small business issuers and registrants other than small business issuers were required to comply with FAS 123R beginning with the first reporting period of the first fiscal year beginning on or after Dec. 15, 2005 and June 15, 2005, respectively. *See Amendment to Rule 4–01(a) of Regulation S–X*

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the effects of the amendments may be modest to the extent that other factors already deter spring-loading (for example, best practices implemented by the compensation committee or generally robust internal corporate governance mechanisms). Finally, the effects of the amendments on executives may be small if issuers adjust compensation to offset the decline in spring-loading under the amendments (*e.g.,* by changing option terms, the allocation of compensation between cash, options, and restricted stock, or the overall amount of compensation).

3. Costs

We recognize that the amendments to Item 402 requiring additional disclosure of the timing of option awards and related corporate policies will impose certain costs on issuers, as suggested by various commenters.[546] The amendments will result in direct compliance-related costs for affected filers of compiling the information required in amended Item 402 for inclusion in the annual report or proxy or information statement. Because issuers either already provide such information (option grant information and dates) for other disclosures or can readily obtain the information (daily share prices and dates of EDGAR filings), the direct costs are expected to be modest. We acknowledge that issuers will incur some direct costs of aggregating such existing information into the tabular format. Further, issuers will incur compliance-related costs to assess which of the filings from the reporting period contained MNPI and thus should be a part of the tabular disclosure. These direct costs of complying with the new tabular disclosure may be potentially mitigated to the extent that issuers can leverage existing systems and recordkeeping practices used to prepare the plan-based table disclosure required today, as well as internal records on the dates of other disclosures filed on EDGAR with the Commission.

Issuers will incur compliance costs of structuring the Item 402(x) disclosure in Inline XBRL. Such costs will be higher for filers with more option grants subject to the new disclosure. However, because filers subject to the amendments already are or will soon be subject to other structured disclosure requirements (*e.g.,* Inline XBRL requirements for financial statement information and cover page information in certain filings), the incremental cost of submitting the compensation disclosure using a structured data language will likely be relatively modest.[547] We expect that the direct costs of Inline XBRL tagging of the new disclosure may be potentially mitigated to the extent that issuers subject to the amendments, which already utilize Inline XBRL tagging to comply with other filing obligations, may leverage existing systems or only incur an incremental cost when utilizing outside service providers to tag the new disclosures in proxy statements.

The amendments also may result in indirect costs for issuers and executives. Disclosure of option grant timing practices could result in reputational harms for some issuers or individual executives, such as unfavorable say-on-pay votes, if investors perceive such practices as inconsistent with shareholder value maximization and optimal compensation policies. Outside scrutiny of this disclosure may cause issuers to forgo such option grant timing practices. For issuers at which such practices arose from efforts to implement an economically optimal compensation policy for issuers and executives,[548] deviating from such a policy could result in less optimal compensation. Some commenters also indicated that these disclosures may mislead investors by causing them to infer a causal link between option awards and the release of MNPI where none exists.[549] The shorter reporting window for the tabular disclosure in the final amendments and removal of the share repurchase triggering event are expected to substantially alleviate this concern. At issuers that forgo option grant timing but do not change other compensation terms to offset it, executives could experience smaller, more volatile compensation awards. However, it is important to note that the final rules do not require a particular option grant timing policy. Rather, the amendments aim to incrementally improve transparency about such compensation awards, enabling investors to more fully gauge the key terms of compensation arrangements and their implications for executives' incentives and thus, ultimately, firm value.

Several considerations would mitigate the potential indirect costs of the disclosure requirement to issuers. Given that this disclosure would incrementally improve access to information about option grant timing practices, in cases where such practices are optimal from the standpoint of shareholder value, issuers likely would not make inefficient changes to those compensation practices as a result of the improved investor access to such information under the new rules (however, the direct costs of compliance with the rule, discussed above, may potentially result in inefficient compensation changes). Issuers for which compensation awards timed in this manner are consistent with shareholder value maximization should be able to readily preserve the economic effects of such compensation for executives, either by continuing their existing compensation practices or by altering the size or other terms of the award to ensure a similar value of compensation. Moreover, issuers may be able to use other, readily available means to adjust compensation terms to achieve a similar outcome.[550]

As discussed in Section V.D.2 above, several factors are expected to potentially limit the incremental impact of the new tabular disclosure and thus the magnitude of the discussed indirect economic costs. First, the indirect costs of the amendments likely will be modest due to the availability of the information subject to the new disclosure requirement in other sources today, as indicated by various commenters.[551] Second, the discussed indirect costs may also be reduced to the extent that the newly required information is already contained in compensation disclosures. Third, the discussed indirect costs may be partly attenuated to the extent that some investors may find the tabular disclosure to be too extensive or difficult to parse for issuers with multiple MNPI filings and option grants for different NEOs.

Further, as discussed in Section V.D.2 above, some investors may incorrectly interpret information in the disclosure as evidence of spring-loading, which may in turn increase indirect costs for issuers and insiders. Such incorrect interpretations may happen due to confounding events between the option grant date and MNPI disclosure dates within the reporting window (with less potential for confounding with a shorter window); market prices being slow to adjust to the MNPI disclosure (*e.g.,* at some issuers with thinly traded securities); market- or sector-wide

Regarding the Compliance Date for Statement of Financial Accounting Standards No. 123 (Revised 2004), Share-Based Payment, Release No. 33–8568 (Apr. 15, 2005) [70 FR 20717 (Apr. 21, 2005)].

[546] *See supra* note 297.

[547] *See supra* note 496.

[548] *See supra* notes 533 and 537. *But see supra* note 531.

[549] *See supra* note 540.

[550] Issuers could lower the exercise price, increase the number of options granted, decrease the proportion of options in overall pay, increase overall pay, modify performance-based or other compensation terms, or some combination of those.

[551] *See supra* note 539.

events affecting market prices on MNPI disclosure dates; or coincidental nature of option grants close in time with MNPI disclosures (*e.g.,* with frequent or routine grants).[552]

The above discussion has focused on the tabular disclosure of new Item 402(x)(2). In addition, new Item 402(x)(1) mandates disclosure of policies and practices related to option grant timing around MNPI, which is not presently required. While issuers are likely to have information readily available about policies and practices related to option grant timing, they will likely incur some direct compliance costs to compile and prepare that information for public disclosure. Issuers may also incur indirect costs of this disclosure. Specifically, issuers with policies and practices that allow strategic option grant timing may incur reputational costs of such disclosure. Further, the anticipation of public disclosure may lead such issuers to adopt policies and practices disallowing option grants around MNPI, which, in some cases may result in a deviation from optimal compensation policies.[553] Such changes may also impose costs on executives, to the extent other compensation terms are not adjusted in an offsetting manner, as described above. To the extent that issuers already provide disclosures of policies and procedures related to option grant timing following the 2006 Executive Compensation Release,[554] the costs incremental to the amendments will be lower.

Finally, as discussed in Section V.D.2 above, the overall economic costs of the new disclosures required by Items 402(x)(1) and 402(x)(2) are expected to be more modest to the extent that fewer issuers rely on stock option compensation.[555] Further, the cost to executives of the decline in strategic option grant timing may be lower if other factors already deter such option grant timing (*e.g.,* compensation committee policies or other corporate governance mechanisms) or if issuers make offsetting adjustments to executive compensation (*e.g.,* by changing option terms, the mix of cash, options, and restricted stock, or the amount of compensation).

4. Effects on Efficiency, Competition, and Capital Formation

We expect the disclosures required in new Item 402(x) to incrementally decrease the information asymmetry between insiders and investors about the issuer's option compensation awards and associated policies, resulting in better information about the insiders' incentives that may derive from such option awards. This effect may result in more informationally efficient prices and more efficient allocation of capital in investor portfolios. Greater accessibility to investors of information about the timing of option compensation awards may marginally reduce shareholders' information gathering costs and enable them to make more efficient voting decisions in say-on-pay and director election votes.

To the extent that option spring-loading is inconsistent with shareholder value maximization and the amendments draw market scrutiny to issuers engaged in spring-loading, the amendments may result in a decrease in option spring-loading. In turn, a decrease in spring-loading may weaken insiders' incentives to game corporate disclosures, which may result in potentially timelier and higher-quality disclosures (that enable more informationally efficient share prices and more efficient allocation of capital in investor portfolios).

To the extent that the Item 402 requirements impose a fixed cost on issuers, they will have a negative competitive effect on smaller issuers subject to the amendments, as well as on issuers that do not already disclose policies and practices related to the timing of awards of stock options close in time to the release of MNPI. The final amendments defer by six months the date of compliance with the additional disclosure requirements for SRCs,[556] potentially mitigating some of the adverse competitive effects of the amendments. The disclosure requirements will not apply to FPIs, placing them at a relative competitive advantage to domestic filers.

Because the disclosure amendments will apply broadly across domestic public issuers, generally, we do not anticipate them to result in meaningful competitive disparities in the labor market for executive talent.[557]

The described effects are expected to be attenuated to the extent investors already can infer whether issuers time option awards prior to releases of MNPI based on existing disclosures of option grant dates and other public information. The described effects may also be attenuated to the extent that issuers engaged in option spring-loading already disclose such policies and practices as a result of the 2006 Executive Compensation Release.[558]

5. Reasonable Alternatives

New Item 402(x) includes both a new table with information on individual option grants and a requirement to disclose policies and practices regarding the timing of option awards in relation to the disclosure of MNPI. As an alternative, we could adopt only one of those requirements, which could reduce the costs of disclosure for filers discussed in Section V.D.3 above.[559] However, omitting one of the disclosure requirements would provide investors with less information about option compensation practices, resulting in potentially less informed investment and voting decisions. For example, omitting the tabular disclosure requirement could marginally reduce the salience of information about the actual timing of option grants around MNPI releases and the effects of such timing on the value of granted options in cases where an issuer discloses that it does not have policies restricting option awards around MNPI releases. In turn, omitting the requirement to disclose the issuer's practices and policies regarding the timing of option awards would reduce the amount of information about potential future compensation practices, compared to the amendments. Nevertheless, there is likely to be some substitution between the information benefits of the two requirements, particularly in combination with the existing requirements to disclose grant dates.

New Item 402(x)(2) will require tabular disclosure of awards made during a period starting four business days before and ending one business day after the filing of a periodic report on Form 10–Q or Form 10–K or the filing or furnishing of a current report on Form 8–K that discloses MNPI other than a current report on Form 8–K disclosing a material new option award grant under Item 5.02(e). A typical issuer files or furnishes multiple such reports in a given year and may include multiple option and SAR awards in the new tabular disclosure.[560] As an

[552] *See supra* note 540.

[553] *See supra* notes 533 and 537.

[554] *See* 2006 Executive Compensation Release, *supra* note 277.

[555] *See supra* note 545.

[556] Based on staff review of EDGAR filings for calendar year 2021, approximately 3,200 of the filers subject to the new Item 402(x) requirements are SRCs and thus will be eligible for the extended compliance date under the amendments.

[557] The amendments will not apply to FPIs.

[558] *See* 2006 Executive Compensation Release, *supra* note 277.

[559] *See* letter from Dow (suggesting that the Commission's concerns are sufficiently addressed by the narrative disclosure requirements of proposed Item 402(x)).

[560] During calendar year 2021, the average annual report/proxy statement filer (excluding asset-backed

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alternative, we could use a shorter or longer time period around reports with MNPI during which awards would be subject to the tabular disclosure. A shorter (longer) time period could result in less (more) disclosure and thus incrementally lower (higher) disclosure costs for issuers, compared to the amendments. Because prices may change for reasons other than the release of MNPI when a longer time period is used, pre- and post-filing prices might be more informative for assessing the effects of the MNPI release on the valuation of option awards made during a shorter window around the filing. Shortening (lengthening) the window under these alternatives would reduce (increase) the amount of information aggregated in one location about options granted in proximity to MNPI releases, potentially resulting in marginally less (more) informed investment and voting decisions.

As another alternative, we could further modify the scope of reports that trigger the tabular disclosure, such as by omitting Forms 8–K or limiting it to Forms 8–K that contain Items 1.01 or 2.02, as suggested by some commenters.[561] Narrowing the set of triggers in this manner would reduce the amount of information aggregated in one location about options granted in proximity to MNPI releases,[562] potentially resulting in marginally less informed investment and voting decisions. At the same time, it would reduce the costs incurred by issuers, discussed in Section V.D.3 above.

As another alternative, we could require tabular disclosure of awards made within four business days before and four business after the filing of a periodic report or the filing or furnishing of any Form 8–K that discloses MNPI.[563] Compared to the amendments, this alternative would potentially improve the accessibility to investors of data that can be used to gauge the presence of bullet-dodging as well as spring-loading, rather than primarily focusing on spring-loading.[564] This could incrementally improve the information benefits of the disclosure to investors. However, the improvement in information benefits under this alternative may be small if the additional disclosure introduces considerable noise. For example, if issuers schedule option grants shortly after the disclosure of MNPI in a periodic or current report, specifically because they are least likely to be in possession of MNPI during that time frame, the tabular disclosure would include a considerable number of options that are not granted strategically. In turn, this alternative could increase costs (discussed in detail in Section V.D.3 above), compared to the amendments.

Consistent with other provisions of Item 402, the amendments apply to awards to NEOs. This approach ensures consistency with other existing compensation disclosures and provides information about awards to the subset of executives likely to have MNPI as well as the most influence on the issuer's business decisions. As alternatives, we could limit the disclosure to the CEO or expand it to all executives. The alternative of narrowing (expanding) the set of executives whose awards are subject to the new disclosure requirement would result in lower (higher) disclosure costs but also would result in less (more) information about the timing of option awards and executive incentives, compared to the amendments. These alternatives would also decrease consistency across compensation disclosures.

The amendments require the additional disclosure to be submitted using a structured (*i.e.,* machine-readable) data language. As an alternative, we could require the disclosure but not require the use of a structured data language. Compared to the amendments, this alternative could make it harder for investors to extract the disclosure information, potentially increasing the costs they incur in making investment and voting decisions. However, this alternative also would decrease costs for affected filers (particularly for filers with more option grants subject to the new disclosure), compared to the amendments.

E. Additional Disclosure of Insider Gifts of Stock

The amendments will require the disclosure of insiders' gifts of stock within two business days on Form 4. This amendment is a change from the existing rules that allow a stock gift to be disclosed on Form 5, which is required to be filed within 45 days of the end of the year during which the gift was made. It will result in timelier disclosure of such transactions across all affected insiders.

1. Baseline and Affected Parties

The amendments will affect insiders that make gifts of stock and report them on Form 5 today, although the majority of insiders already report gifts of stock

securities issuers and registered investment companies) filed Forms 10–K, 10–Q, 8–K, or amendments to them, on 15 different days. The use of a window starting four business days before and ending one business day after the date of a filing on Form 10–K, 10–Q, or 8–K results in a potential average disclosure coverage period of approximately 91 calendar days out of 365 (compared to the average disclosure coverage period of 220 calendar days based on the proposed +/−14 calendar day window). Because option grants, unlike EDGAR filings, are sometimes made on non-business days, the estimate reports the number of potentially affected calendar days. As issuers typically grant options only a few times a year, rather than on every one of those potentially affected days, we also evaluate the number of actual option grants that fall in the disclosure coverage period under the amendments. Based on staff analysis of Institutional Shareholder Services' (ISS) Incentive Lab data on plan-based option and SAR awards made during calendar year 2021 (retrieved Aug. 10, 2022), the use of this window results in 2.9 grants (out of 5.4 grants) subject to the disclosure for the average affected filer (compared to the 4.6 grants subject to the disclosure for the average affected filer based on the proposed +/−14 calendar day window). To account for potential lags in proxy data ingestion, which may make the data for 2021 underinclusive of some affected filers with plan-based awards made in 2021, we also consider the ISS Incentive Lab estimate for calendar year 2020 (also based on data retrieved August 10, 2022): this results in 2.9 grants (out of 5.6 grants) subject to the disclosure for the average affected filer (compared to 4.8 grants subject to the disclosure for the average affected filer based on the proposed +/−14 calendar day window). As a caveat, ISS Incentive Lab data is constructed from proxy statement information for a subset of the affected filer universe, dominated by larger companies (371 issuers with option or SAR grant data for year 2021 and 461 for year 2020), and thus may not be representative of all affected filers, such as smaller filers that may make fewer awards or file fewer current reports. The above estimates exclude from the list of MNPI filings those Forms 8–K that are classified as reporting compensation arrangements (Item 5.02(e)) to avoid mechanical effects (such filings are identified as Form 8–K filings that only report Item 5.02, based on EDGAR data, and that also mention either Item 5.02(e) or related keywords (''stock option'', ''option'' and ''grant'', ''named executive officer'') in the body of the filing, based on the analysis of Intelligize data). The definition of ''business days'' excludes weekends and Federal holidays.

[561] *See supra* note 307.

[562] For example, requiring disclosure of option grants made during a window starting four business days before and ending one business day after the filing of Form 10–K or 10–Q (omitting the Form 8–K trigger) would shorten the disclosure coverage period to approximately 33 calendar days out of 365 for the average affected filer during calendar year 2021, based on EDGAR filings data, and decrease the number of affected grants to approximately 1.4 out of 5.4 for calendar year 2021 (1.4 out of 5.6 for calendar year 2020) for the average issuer, based on Incentive Lab data. See *supra* note 560 for a description of how these estimates were obtained.

[563] The use of a window starting four business days before and ending four business days after filings of Form 10–K, 10–Q, or 8–K would result in a potential average disclosure coverage period of approximately 126 calendar days out of 365, based on EDGAR filings data for calendar year 2021, and approximately 3.7 grants (out of 5.4 grants) subject to the disclosure for the average issuer, based on ISS Incentive Lab data for calendar year 2021 (and approximately 3.8 affected grants out of 5.6 grants for the average filer, based on ISS Incentive Lab data for calendar year 2020). See *supra* note 560 for a description of how these estimates were obtained.

[564] Bullet-dodging can cause a call option to be at-the-money when it would have otherwise been out-of-the-money, assuming negative MNPI is about to be released. Generally speaking, the value of an at-the-money call option has a higher sensitivity to the share price than the value of an out-of-the-money call.

on Form 4. We estimate that approximately 800 insiders reported gifts of stock on Form 5 during calendar year 2021 (including approximately 200 insiders that reported gifts both on Form 4 and Form 5).[565] The majority of insiders reporting gifts of stock already report gifts of stock on Form 4: during calendar year 2021 approximately 3,000 insiders reported stock gifts on Form 4 (including approximately 200 insiders that made both Form 4 and Form 5 filings reporting stock gifts).

2. Benefits

To the extent that not all insiders presently report gifts of stock on Form 4, the amendments to Form 4 to require disclosure of such gifts of stock will result in timelier availability of information about beneficial ownership by the issuer's insiders, which was supported by various commenters.[566] Disposition of an insider's shares through a gift in many cases reduces that insider's economic exposure to the issuer, which potentially weakens the alignment of incentives with the shareholder value maximization objective. A scenario in which an insider gifts stock while aware of MNPI and the recipient sells the gifted securities while the information remains nonpublic and material is economically equivalent to a scenario in which the insider trades on the basis of MNPI and gifts the trading proceeds to the recipient (see Section II.E for more details).

While non-pecuniary motives may be more important in a gift than in an open-market sale, the timing of a gift can reveal the insider's beliefs about the issuer's future share price. For an insider that has decided to make a gift, finding the time when the shares are priced higher (*e.g.,* before the release of negative MNPI) will allow the insider to reduce the effective cost of the gift.[567] In light of this, disclosure of timely information about the stock gift could be informative for investors evaluating the issuer's share price and making investment or sale decisions.[568] However, these information benefits will be lower if the officer or director does not consider the cost of a gift (*e.g.,* because the amount of the gift is small or relatively inconsequential in the context of the insider's overall net worth).

Finally, the requirement to disclose insiders' stock gifts on Form 4 will facilitate market scrutiny and may reduce an insider's marginal incentive to donate stock based on MNPI, thereby reducing the associated incentive distortions.[569] While an insider's benefit from using MNPI to time stock gifts may be smaller than in the case of timing trades, the ability to profit from such stock gift timing is expected to have a similar direction of the effect on insider incentives (such as incentives to pursue inefficient corporate decisions or to distort disclosure, in line with the discussion in Section V.A above).

We recognize that these benefits of the amended Form 4 requirements will be substantially reduced to the extent that most insider gifts of stock already are reported on Form 4, as noted in Section V.E.1 above.

3. Costs

As several commenters noted, amended Form 4 disclosure with regard to gifts of stock will result in additional costs for insiders.[570] Direct costs of accelerated gift reporting will include additional compliance-related costs, which may be higher for more complex transactions involving gifts, such as estate planning transactions.[571] Indirect costs may include reputational and investor relations costs stemming from increased market scrutiny of gifts of stock, as well as potential changes to gifting behavior in anticipation of such scrutiny.[572] We note that these costs of the amended Form 4 requirements will be substantially reduced to the extent that most insider gifts of stock already are reported on Form 4, as noted in Section V.E.1 above.

4. Effects on Efficiency, Competition, and Capital Formation

We expect the amendments to incrementally decrease the information asymmetry between insiders and investors. Recent disposition of shares through gifts of stock informs investors about changes to officers' and directors' incentives derived from holdings of issuer stock. Timely information about the disposition of shares through stock gifts could in some circumstances inform investors about officers' and directors' outlook on future changes to the issuer's share prices. Both factors may result in more informationally efficient prices and more efficient allocation of capital in investor portfolios.

Importantly, we expect the amendments to draw market scrutiny to insiders' use of MNPI in the timing of stock gifts, potentially decreasing the incidence of such stock gift timing. This reduces insiders' incentives to manipulate corporate disclosures around stock gifts, which could in turn yield more informationally efficient share prices and more efficient allocation of capital in investor portfolios. The amendments also could marginally reduce insider incentives to pursue inefficient corporate investment decisions driven by personal gain from gifts based on MNPI, in line with the discussion in Sections V.A and V.E.2 above.

Because this amendment will apply broadly across all insiders' stock gifts, generally, we do not anticipate it to result in meaningful competitive disparities among insiders.

5. Reasonable Alternatives

The amendments require timelier disclosure of insider gifts of stock. As an alternative, we could narrow the scope of the amended gift disclosure to apply only to officers and directors, or only to

[565] The estimate is based on Form 5 data in Thomson Reuters/Refinitiv insiders dataset (version retrieved June 27, 2022). Gifts of stock are identified based on transaction code ''G'' (''bona fide gift'').

[566] *See supra* notes 329 and 330 and accompanying text.

[567] In addition to any tax benefit from charitable stock gifts, an altruistic insider-donor may internalize the benefit to the donee. *See, e.g.,* Louis Kaplow, *A Note on Subsidizing Gifts,* 58 J. Public Econ. 469 (1995); Louis Kaplow, *Tax Policy and Gifts,* 88 Am. Econ. Rev. 283 (1998).

[568] *See* letter from Mittendorf (citing Anil Arya et al., *Tax-favored Stock Donations by Corporate Insiders and Consequences for Equity Markets,* 2022 Mgmt. Sci. (forthcoming) (2022) (developing a ''model of informed stock trading when disposal of stock by insiders takes the form of tax-favored charitable donations rather than direct trading'' and demonstrating ''that charitable gifts by insiders can reflect nonpublic information about firm value'') (''Arya et al. (2022)'') and concluding that ''evidence suggests both prevalence of insiders making gifts strategically and potential consequences of accelerating public disclosure of such gifts as proposed in the amendment to Exchange Act Rule 16a–3.''); *see also* Sureyya Burcu Avci et al., *Insider Giving,* 2021 Duke L. J. 71 (2021) (finding evidence of informed timing of gifts of stock by the subset of insiders that are beneficial owners and also pointing to gift backdating as a potential consequence of delayed reporting of stock gifts with the latter providing inaccurate information to investors about changes to an insider's ownership incentives and incentive alignment with shareholder interests); Yermack (2009), *supra* note 328 (demonstrating that these effects of strategic giving behavior are even more pronounced when gifts are to (nonoperating) private foundations).

[569] *But see* letter from Mittendorf citing Arya et al. (2022) (demonstrating, in a ''model of informed stock trading when disposal of stock by insiders takes the form of tax-favored charitable donations,'' ''that charitable gifts by insiders can reflect nonpublic information about firm value, and that they do so in a manner that promotes greater market efficiency'' and that ''relative to informed trading, insider donations yield greater market liquidity, more efficient equity prices, and superior investor protection.'') As an important caveat, the paper is based on a theoretical model rather than an empirical analysis of insider giving.

[570] *See supra* notes 331 and 332 and accompanying text.

[571] *See, e.g.,* letters from Davis Polk and HRPA.

[572] *See supra* note 333. In effect, then, allowing insiders to donate based on MNPI without Form 4 reporting would transfer value to donees at the expense of other traders and of market liquidity.

a certain type of gift of stock (*e.g.,* charitable gifts to charities affiliated with the insider). Compared to the amendments, narrowing the scope of gifts subject to the disclosure could provide less information to market participants [573] but also result in lower aggregate costs. Further, because the majority of insiders already disclose gifts on Form 4, the economic significance of potential exemptions under this alternative may be modest. The requirement will provide consistency in the timeliness of reporting of stock gifts across insiders.

VI. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules, schedules, and forms that would be affected by the rule amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[574] The Commission published a notice requesting comment on revisions to these collections of information requirements in the Proposing Release and has submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[575] The hours and costs associated with preparing, filing, and sending the schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. The titles for the collections of information are:

- Form 10–K (OMB Control No. 3235–0063);
- Form 10–Q (OMB Control No. 3235–0070);
- Schedule 14C (OMB Control No. 3235–0057);
- Schedule 14A (OMB Control No. 3235–0059);
- Form 4 (OMB Control Number 3235–0287);
- Form 20–F (OMB Control Number 3235–0288);
- Form 5 (OMB Control Number 3235–0362); and
- Rule 10b5–1 (a new collection of information).

The forms, schedules, and regulations listed above were adopted under the Securities Act and/or the Exchange Act. These regulations, schedules, and forms set forth the disclosure requirements for registration statements, periodic and current reports, distribution reports, and proxy and information statements filed by registrants to help investors make informed investment and voting decisions. Compliance with these information collections is mandatory. Responses to these information collections are not kept confidential, and there is no mandatory retention period for the information disclosed. Rule 10b5–1 sets forth the conditions to the affirmative defenses under the rule. The use of the affirmative defenses is voluntary, and compliance with this information collection would be mandatory only if a respondent chooses to rely on the affirmative defenses. Responses to this information collection will not be confidential and there is no mandatory retention period for the collection of information.

A description of the amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the amendments can be found in Section V above.

B. Summary of Comment Letters

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive such estimates. We did not receive any comments that directly addressed the PRA analysis of the proposed amendments. Several commenters, however, did provide responses to certain requests for comment that have informed some of our PRA estimates. As discussed, above, we have made some changes to the proposed amendments as a result of comments received in response to the Proposing Release. We have revised our estimates from the Proposing Release accordingly, taking into account the changes and the comments received.

C. Summary of Collections of Information Requirements

As discussed in more detail in the Proposing Release,[576] we derived the burden hour estimates by estimating change in paperwork burden as a result of the amendments. As discussed in Section II, we have made several changes to the proposed amendments as a result of comments received. Some of these changes impact our estimates.[577]

In the Proposing Release, the Commission estimated that the average incremental burden for an issuer to prepare the Item 408(a) disclosure would be 15 hours. The proposed estimate included the time and cost of preparing the disclosure, as well as tagging the data in XBRL format. We have revised new Item 408(a) to (1) clarify that Item 408(a) does not require disclosure of pricing terms, and (2) not require quarterly disclosure regarding the adoption and termination of Rule 10b5–1 plans and non-Rule 10b5–1 trading arrangements by an issuer. To reflect the impact of this change on our estimate, we first estimate the burden of each of the two proposed components we are not adopting and deduct this amount from the proposed 15 hours. We estimate that the burden of disclosing the proposed disclosure of pricing terms of Rule 10b5–1 plans would have been two hours and that burden of preparing proposed disclosure regarding the adoption and termination of Rule 10b5–1 and non-Rule 10b5–1 trading arrangements by a registrant would have been three hours for a combined burden of five hours. Therefore, we are reducing the estimated the burden of Item 408(a) from 15 hours to 10 hours.

We also are not adopting the proposed optional checkboxes on Forms 4 and 5 that would allow a filer to indicate whether a reported transaction was made pursuant to a pre-planned contract, instruction, or written plan for the purchase or sale of equity securities of the issuer that did not satisfy the affirmative conditions of Rule 10b5–1(c). We do not believe this change would substantively modify the collection of information requirements or otherwise affect the overall burden estimates associated with these forms. We are, however, adjusting the burden estimate for Form 5 to reflect the impact of requiring the disclosure of dispositions of equity securities by bona fide gifts on Form 4, rather than on Form 5. We believe this change would

[573] *See supra* note 568 (discussing a recent study that documents widespread informed gift timing not limited to insider-affiliated charities).

[574] 44 U.S.C. 3501 *et seq.*

[575] *See* 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[576] *See* Section V of the Proposing Release.

[577] The changes to new Item 408(b) and Item 16J, the amendments to Forms 4 and 5, and the new certification condition of Rule 10b5–1(c)(1)(ii)(C) did not impact our estimates. Item 408(b) and Item 16J of Form 20–F will require that an issuer file its insider trading policies and procedures as an exhibit to the applicable filing rather than in its body, and that exhibit will not be tagged. Because this change only moves the location of this disclosure and eliminates one tagging requirement, we believe a four hour burden estimate remains appropriate. Finally, the certification will be included in the Rule 10b5–1 plan as a representation rather than prepared as a separate document to be furnished to the issuer. We do not expect this change in disclosure location to change the PRA burden on the director or officer. The removal of the retention instruction for the certification similarly does not affect our PRA burden estimates as that retention instruction was not included in the PRA estimate in the Proposing Release.

result in a decrease in 0.25 hours in the information collection burden for Form 5.

In addition, the table required by new Item 402(x) will cover stock options, SARs, and/or similar option-like instruments awarded to a named executive officer within a four business day period before and a one day period after certain triggering events. This is a change from the proposal, in which the time window for disclosure would have been the 14 day period before and after the event. We also narrowed the events that trigger this disclosure by removing the issuer share repurchase disclosure trigger and carving out Item 5.02(e) Forms 8–K that report the grant of a material new option award. As a result, we expect fewer awards will be disclosed. Accordingly, we have adjusted our PRA estimate for this disclosure from nine hours to six hours per form.

The following table summarizes the estimated effects of the final amendments on the paperwork burdens associated with the affected forms.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE FINAL AMENDMENTS

Final amendments	Affected forms or schedules	Estimated burden increase and/or decrease
Item 402(x):		
• Require disclosure of a registrant's policies and practices on the timing of awards of stock options, SARs or similar option-like instruments in relation to the disclosure of material nonpublic information by the registrant, including how the board determines when to grant options, whether the board or compensation committee takes material nonpublic information into account when determining the timing and terms of an award; and whether the registrant has timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation..	Form 10–K* and Schedules 14A, and 14C.	6 hour increase in compliance burden per form.
• Require tabular disclosure of each option award granted within four business days before and one business day after the filing of a periodic report or the filing or furnishing of a current report on Form 8–K that contains material nonpublic information (other than disclosure of a material new option award grant under Item 5.02(e) of Form 8–K).		
• Require information to be reported using a structured data language..		
Item 408(a):		
• Require disclosure of the adoption or termination of any contract, instruction or written plan for the purchase or sale of securities intended to satisfy the affirmative defense conditions of Rule 10b5–1(c) and non-Rule 10b5–1 trading arrangements, by directors and officers (as defined in Exchange Act Rule 16a-1(f)), including the name and title of the director or officer; and a description of the material terms of the contract, instruction or written plan (other than pricing terms).	Forms 10–K and 10–Q	10 hour increase in compliance burden per form.
• Require information to be reported using a structured data language.		
Item 408(b) and Item 16J:		
• Require disclosure of whether the registrant has adopted (and if not, why) insider trading policies and procedures governing the purchase, sale, and other dispositions of the registrant's securities and require filing of a copy of its insider trading policies and procedures as an exhibit to Form 10–K..	Forms 10–K,* 20–F, and Schedules 14A, and 14C.	4 hour increase in compliance burden per form.
• Require information to be reported using a structured data language..		
Form 4:		
• Require reporting of dispositions of equity securities by bona fide gifts.	Form 4	0.5 hour increase in compliance burden per form.
• Require new checkbox disclosure to indicate that a sale or purchase reported on the form was made pursuant to a contract, instruction, or written plan that is intended to satisfy the Rule 10b5–1(c)(1) affirmative defense, and require disclosure of the date of adoption of the plan..		
Form 5:		
• Require new checkbox disclosure to indicate that a sale or purchase reported on the form was made pursuant to a contract, instruction, or written plan that is intended to satisfy the Rule 10b5–1(c)(1) affirmative defense, and require disclosure of the date of adoption of the plan..	Form 5	0.25 hour increase in compliance burden per form.
.....		
• Require reporting of dispositions of equity securities by bona fide gifts on Form 4, rather than on Form 5..	.....	0.25 hour decrease in compliance burden per form.
Rule 10b5–1(c)(1)(ii):		
• Require directors and ''officers'' (as defined in Exchange Act Rule 16a-1(f)) as a condition to the affirmative defense, to provide representations in written Rule 10b5–1 plans that, on the date of adoption of the plan, (i) they are not aware of any material nonpublic information about the security or issuer or any subsidiary of the issuer; and (ii) that they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade the prohibitions of this section..	.....	1.5 hour compliance burden per written Rule 10b5–1 plan.

NOTES:
*The burden estimate for Form 10–K assumes that Schedules 14A and 14C would be the primary disclosure documents for the information provided in response to Item 402(x) and Item 408(b) of Regulation S–K and the disclosure requirement under Form 10–K would be satisfied by incorporating the information by reference from the proxy or information statement.

D. Burden and Cost Estimates Related to the Amendments

Below we estimate the incremental and aggregate increase in paperwork burden as a result of the final amendments. These estimates represent the average burden for all respondents, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual respondents based on a number of factors.

We do not believe that the final amendments will change the frequency of responses to the existing collections of information; rather, we estimate that the proposed amendments would change only the burden per response. For the new collection of information, we estimate that there would be 8,700 responses based on the staff's analysis, discussed in Section V.B.1, of beneficial ownership filings on Forms 3, 4, and 5 made in the 2021 calendar year.[578] Based on the data from these filings, approximately 5,800 officers and directors reported a transaction pursuant to a Rule 10b5–1 trading arrangement. As noted above, the number of officers and directors using a Rule 10b5–1 trading arrangement is likely larger. Accordingly, we adjusted the estimate upward by 50 percent.

The burden estimates were calculated by multiplying the estimated number of responses by the estimated average

[578] *See supra* note 377 and accompanying text.

amount of time it would take a respondent to prepare and review the disclosures that will be required under the final amendments. For purposes of the PRA, the information collection burden is allocated between internal burden hours and outside professional costs.

The table below sets forth the percentage estimates we typically use for the burden allocation for each form.[579] We also estimate that the average cost of retaining outside professionals is $600 per hour.[580]

PRA TABLE 2—STANDARD ESTIMATED BURDEN ALLOCATION FOR SPECIFIED FORMS AND SCHEDULES

Form/schedule type	Internal (percent)	Outside professionals (percent)
Forms 10–K, 10–Q, and Schedules 14A and 14C	75	25
Form 20–F	25	75
Forms 4 and 5	100	
Rule 10b5–1	100	

The table below illustrates the incremental change to the total annual compliance burden of affected forms and schedules, in hours and in costs, as a result of the final amendments.[581]

PRA TABLE 3—CALCULATION OF THE INCREMENTAL CHANGE IN BURDEN ESTIMATES OF CURRENT RESPONSES RESULTING FROM THE FINAL AMENDMENTS

Form or schedule	Number of estimated affected responses (A)	Estimated burden hour increase /affected response (B)	Total incremental increase in burden hours (C) = (A) × (B)	Estimated increase in internal burden hours (D) = (C) × (allocation %)	Estimated increase in outside professional hours (E) = (C) × (allocation %)	Total increase in outside professional costs (F) = (E) × $600
10–K	8,292	11	91,212	68,409	22,803	$13,681,800
10–Q	22,925	10	229,250	171,937.5	57,312.5	34,387,500
20–F	729	4	2,916	729	2,187	1,312,200
14A	6,369	10	63,690	47,767.5	15,922.5	9,553,500
14C	569	10	5,690	4,267.5	1,422.5	853,500
4	338,207	0.5	169,103.5	169,103.5	0	0
5	5,939	0			0	0
Total				461,485		59,788,500

PRA Table 4 illustrates the change to the annual cost burden of the affected forms as a result of the adjustment to the average cost of retaining outside professionals from $400 to $600 per hour.[582]

PRA TABLE 4—CALCULATION OF THE CHANGE IN COSTS OF CURRENT RESPONSES RESULTING FROM THE AVERAGE HOURLY COST ADJUSTMENT

Form or schedule	Number of affected responses	Current cost burden at $400 per hour	Adjusted cost burden at $600 per hour
10–K	8,292	$1,840,481,319	$2,805,092,400
10–Q	22,925	414,613,154	626,150,400
20–F	729	576,927,825	862,826,400
14A	6,369	101,958,512	152,989,800
14C	569	7,350,144	11,023,600

[579] In the Proposing Release, we used a 75% company and 25% outside professional allocation for Form 20–F, but upon further consideration we believe that a 25% company and 75% outside professional allocation for Form 20–F better reflects current practice for this form because FPIs rely more heavily on outside counsel for their preparation.

[580] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $600 per hour. At the proposing stage, we used an estimated cost of $400 per hour. We are increasing this cost estimate to $600 per hour to adjust the estimate for inflation from August 2006 to the present. The inflation-adjusted hourly amount is $583.88, which we have rounded up to $600.

[581] The number of estimated affected responses is based on the number of responses in the Commission's current OMB PRA filing inventory. The OMB PRA filing inventory represents a three-year average. These averages may not align with the actual number of filings in any given year.

[582] *See supra* note 580. The table adjusts the average cost of retaining outside professionals from $400 to $600 per hour for the affected Exchange Act forms.

The following tables summarizes the requested paperwork burden changes to existing information collections, including the estimated total reporting burdens and costs, under the final amendments.[583]

PRA TABLE 5—REQUESTED PAPERWORK BURDEN UNDER THE FINAL AMENDMENTS

Form or Sch.	Current burden			Program change			Requested change in burden		
	Current annual responses (A)	Current burden hours (B)	Current cost burden (C)	Number of affected responses (D)	Increase in internal hours (E)	Increase in outside professional costs (F)	Annual responses (G) = A	Burden hours (H) = B + (E)	Cost burden (I)
10–K	8,292	14,025,462	$1,840,481,319	8,292	68,409	$13,681,800	8,292	14,093,871	$2,818,774,200
10–Q	22,925	3,130,752	$414,613,154	22,925	171,938	$34,387,500	22,925	3,302,690	$660,537,900
20–F	729	479,348	$576,927,825	729	729	$1,312,200	729	480,077	$864,138,600
14A	6,369	764,949	$101,958,512	6,369	47,768	$9,553,500	6,369	812,717	$162,543,300
14C	569	55,118	$7,350,144	569	4,268	$853,500	569	59,386	$11,877,100
4	338,207	169,104	0	338,207	169,104	0	338,207	338,208	0
5	5,939	5,939	0	5,939	0	0	5,939	0	0

PRA Table 6 summarizes the requested paperwork burden for the collection of information for the representations that will be required under Rule 10b5–1(c)(1)(ii), including the estimated total reporting burdens and costs. For purposes of the PRA, we estimate that the Rule 10b5–1(c)(1)(ii) representation would entail a 1.5 compliance burden per response with 8,700 annual responses.

PRA TABLE 6—REQUESTED PAPERWORK BURDEN FOR THE NEW COLLECTION OF INFORMATION

Collection of information	Paperwork burden	
	Annual responses (A)	Burden hours (A) × 1.5
Rule 10b5–1(c)(1)(ii) Representation	8,700	13,050

VII. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with the Regulatory Flexibility Act (''RFA'').[584] It relates to amendments to Rule 10b5–1(c)(1); Regulation S–K, Forms 10–K, 20–F, 10–Q, 4, and 5; and Schedules 14A and 14C.

A. Need for, and Objectives of, the Amendments

The purpose of the final amendments is to address potentially abusive practices associated with Rule 10b5–1 trading arrangements, grants of options and other equity instruments with similar option-like features and the gifting of securities. The final amendments are also intended to provide greater transparency to investors about issuer and insider trading arrangements and restrictions, as well as insider compensation and incentives, enabling more informed voting and investment and decisions about an issuer. The need for, and objectives of, the final rules are described in greater detail in Sections I and II above. We discuss the economic impact and potential alternatives to the amendments in Section V, and the estimated compliance costs and burdens of the amendments under the PRA in Section VI above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, the Commission requested comment on any aspect of the Initial Regulatory Flexibility Analysis (''IRFA''), including how the proposed amendments could achieve their objective while lowering the burden on small entities, the number of small entities that would be affected by the proposed rule and form amendments, the existence or nature of the potential effects of the proposed amendments on small entities discussed in the analysis, and how to quantify the effects of the proposed amendments. We did not receive any comments that specifically addressed the IRFA. However, some commentators addressed aspects of the proposals that could potentially affect small entities.[585] In particular, one commenter supported exempting SRCs from proposed Item 408(a),[586] while other commenters expressed support for requiring SRCs to provide the proposed disclosures.[587] For the reasons discussed above, we have not adopted such an exception.[588]

C. Small Entities Subject to the Amendments

The final amendments would apply to registrants that are small entities. The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.''[589] For purposes of the RFA, under our rules, a registrant, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[590] Under 17 CFR 270.0–10, an investment company, including a business development company, is considered to be a small entity if it,

[583] Figures in this table have been rounded to the nearest whole number. Figures in column (I) are the sum of column (F) and the adjusted cost burdens for each affected form calculated in PRA Table 4 above.

[584] 5 U.S.C. 601 *et seq.*

[585] *See* Section II above.

[586] *See* letter from MD Bar.

[587] *See, e.g.,* letters from ICGN, and Cravath.

[588] *See supra* Section II.B.2.c.

[589] 5 U.S.C. 601(6).

[590] *See* Exchange Act Rule 0–10(a) [17 CFR 240.0–10(a)].

together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. An investment company, including a business development company,[591] is considered to be a ''small business'' if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[592] The Commission staff estimates that, as of January 2022, there were approximately 1,380 issuers and two business development companies that may be considered small entities that would be subject to the proposed amendments.[593]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final amendments to Rule 10b5–1(c) will apply to small entities to the same extent as other entities, irrespective of size. They also do not directly impose any recordkeeping or compliance requirements on small entities.

The amendments to Regulation S–K, Forms 10–K, 20–F, 10–Q, and Schedules 14A and 14C are designed to provide greater transparency about officer and director trading arrangements; policies and procedures with respect to insider trading; and the timing of certain equity compensation awards to NEOs close in time to the release of material nonpublic information. These amendments generally will require:

- Disclosure regarding the adoption and termination of Rule 10b5–1 plans and non-Rule 10b5–1 trading arrangements of officers (as defined in Rule 16a–1(f)) and directors, as well as the material terms of such trading arrangements (other than pricing terms);
- Disclosure of whether the registrant has adopted (and if not, why) insider trading policies and procedures governing the purchase, sale, and other dispositions of the registrant's securities by directors, officers and employees that are reasonably designed to promote compliance with insider trading laws, rules and regulations, and any listing standards applicable to the issuer, and filing such policies and procedures as an exhibit to the registrant's annual report;
- Narrative disclosure of a registrant's policies and practices on the timing of awards of stock options, SARs, and/or similar option-like instruments; and
- Tabular disclosure of each such award granted to an NEO within four business days before and one business day after the filing of a periodic report or the filing or furnishing of a current report on Form 8–K that contains material nonpublic information (other than a current report on Form 8–K disclosing a material new option award grant under Item 5.02(e)).

In addition, the amendments to Forms 4 and 5 will:

- Add a Rule 10b5–1 checkbox to these forms that will require a Form 4 or 5 filer to indicate whether a sale or purchase reported on that form was made pursuant to a contract, instruction or written plan that is intended to satisfy the affirmative defense conditions of Rule 10b5–1(c). Filers would also be required to provide the date of adoption of such trading arrangement; and
- Require the reporting of dispositions of bona fide gifts of equity securities on Form 4.

We anticipate that the direct costs of preparing disclosures in response to the amendments will likely be relatively small as such information will be readily available to issuers. To the extent that the disclosure requirements have a greater effect on small filers relative to large filers, they could result in adverse effects on competition. The fixed component of the legal costs of preparing the disclosure could be one contributing factor. Compliance with certain provisions of the final amendments may require the use of professional skills, including accounting, legal, and technical skills. The final amendments are discussed in detail in Sections I and II above. We discuss the economic impact, including the estimated compliance costs and burdens of the final rules on all issuers, including small entities, in Sections V and VI above.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

Insider trading imposes costs on the investors in a company.[594] The disclosure amendments and the amendments to Rule 10b5–1(c)(1) are intended to provide greater transparency to investors; decrease information asymmetries between corporate insiders and outside investors; and to deter abusive and problematic practices associated with the use of Rule 10b5–1 plans, grants of option awards, and the gifting of securities. Importantly, we anticipate the final amendments will work in tandem to significantly reduce improper insider trading through Rule 10b5–1 plans. As discussed in above in Section V, deterring insider trading will result in benefits for investor protection, capital formation, and orderly and efficient markets. In addition, the amendments will disincentivize insider behavior that undermines investor confidence and harms the securities markets. For these reasons, we generally do not believe it would be appropriate to provide simplified or consolidated reporting requirements, a differing compliance timetable, or an exemption for small entities from all or part of the final amendments, although the final amendments provide for scaled disclosure for SRCs under new Item 402(x), consistent with our scaled approach to executive compensation disclosure. However, to minimize the initial compliance burden on SRCs we are providing a six month transition period for compliance with the new issuer disclosure requirements to mitigate the compliance burdens that SRCs may experience.[595]

With respect to using performance rather than design standards, the final amendments use design standards to promote uniform compliance requirements for all registrants and to address the concerns underlying the amendments, which apply to entities of all sizes. For example, the amendments set forth specific requirements that a

[591] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53–64].

[592] 17 CFR 270.0–10(a).

[593] This estimate is based on staff analysis of Form 10–K filings on EDGAR, or amendments thereto, filed during the calendar year of Jan. 1, 2021 to Dec. 31, 2021, and on data from XBRL filings, Compustat, and Ives Group Audit Analytics. The staff noted that the estimated number of small entities includes approximately 344 entities that are special purpose acquisition companies (''SPACs''). A SPAC is typically a shell company that is organized for the purpose of merging with or acquiring one or more unidentified private operating companies within a certain time frame. Some of these small entities that are SPACs are unlikely to remain small entities once the SPAC has completed its initial business combination and becomes an operating company.

[594] *See supra* Section V.

[595] *See supra* Section III.

trader must satisfy to rely on the Rule 10b5–1(c)(1) affirmative defense. These design standards will better ensure that our concerns related to the misuse of Rule 10b5–1 plans are addressed and that traders understand how they can plan securities transactions in advance and satisfy the conditions of this defense.

Finally, we generally have not exempted small entities from all of part of the requirements, as some commenters requested, as the concerns related to insider trading that underlie these amendments apply to entities of all sizes. For example, as discussed in more detail above, [596] while we are sensitive to the potential that Item 408(a) could have a disproportionate impact on SRCs, we have not exempted SRCs from providing this disclosure as doing so would deprive investors in those issuers of material information about the use and potential abuse of Rule 10b5–1 plans and non-Rule 10b5–1 trading arrangements by an SRC's officers or directors. We note, however, that, to remain consistent with the scaled approach to SRCs' executive compensation disclosure, SRCs may limit the new tabular disclosure of option awards to the PEO, the two most highly compensated executive officers other than the PEO at fiscal year-end, and up to two additional individuals who would have been the most highly compensated but for not serving as executive officers at fiscal year-end.

Statutory Authority

The amendments contained in this release are being adopted under the authority set forth in Sections 3(b), 6, 7, 10, 17, 19(a), and 28 of the Securities Act; Sections 3, 9, 10, 12, 13, 14, 15(d), 16, 20A, 21A, 23(a), and 36 of the Exchange Act; and Sections 8, 20(a), 24(a), 30 and 38 of the Investment Company Act; and 15 U.S.C. 7264.

List of Subjects in 17 CFR Parts 229, 232, 240 and 249

Reporting and recordkeeping requirements, Securities.

Text of the Amendments

For the reasons set out in the preamble, the Commission- amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 1. The authority citation for part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j–3, 78l, 78m, 78n, 78n–1, 78o, 78u–5, 78w, 78*ll,* 78 mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11 and 7201 *et seq.;* 18 U.S.C. 1350; sec. 953(b), Pub. L. 111–203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012).

■ 2. Section 229.402 is amended by adding paragraph (x) to read as follows:

§ 229.402 (Item 402) Executive compensation.

* * * * *

(x) *Disclosure of the registrant's policies and practices related to the grant of certain equity awards close in time to the release of material nonpublic information.* (1) Discuss the registrant's policies and practices on the timing of awards of options in relation to the disclosure of material nonpublic information by the registrant, including how the board determines when to grant such awards (for example, whether such awards are granted on a predetermined schedule); whether the board or compensation committee takes material nonpublic information into account when determining the timing and terms of such an award, and, if so, how the board or compensation committee takes material nonpublic information into account when determining the timing and terms of such an award; and whether the registrant has timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation.

(2)(i) If, during the last completed fiscal year, the registrant awarded options to a named executive officer in the period beginning four business days before the filing of a periodic report on Form 10–Q (§ 249.308a of this chapter) or Form 10–K (§ 249.310 of this chapter), or the filing or furnishing of a current report on Form 8–K (§ 249.308 of this chapter) that discloses material nonpublic information (other than a current report on Form 8–K disclosing a material new option award grant under Item 5.02(e) of that form), and ending one business day after the filing or furnishing of such report provide the information specified in paragraph (x)(2)(ii) of this section, concerning each such award for each of the named executive officers in the following tabular format:

TABLE 13 TO PARAGRAPH (x)(2)(i)

Name	Grant date	Number of securities underlying the award	Exercise price of the award ($/Sh)	Grant date fair value of the award	Percentage change in the closing market price of the securities underlying the award between the trading day ending immediately prior to the disclosure of material nonpublic information and the trading day beginning immediately following the disclosure of material nonpublic information
(a)	(b)	(c)	(d)	(e)	(f)
PEO					
PFO					
A					
B					
C					

[596] *See supra* Section II.B.2.c.

(ii) The Table shall include:

(A) The name of the named executive officer (column (a));

(B) On an award-by-award basis, the grant date of the option award reported in the table (column (b));

(C) On an award-by-award basis, the number of securities underlying the options, (column (c));

(D) On an award-by-award basis, the per-share exercise price of the options (column (d));

(E) On an award-by-award basis, the grant date fair value of each award computed using the same methodology as used for the registrant's financial statements under generally accepted accounting principles (column (e)).

(F) For each instrument reported in column (b), disclose the percentage change in the market price of the underlying securities between the closing market price of the security one trading day prior to and the trading day beginning immediately following the disclosure of material nonpublic information (column (f)).

Instruction to paragraph (x)(2). A registrant that is a smaller reporting company or emerging growth company may limit the disclosures in the table to its PEO, the two most highly compensated executive officers other than the PEO who were serving as executive officers at the end of the last completed fiscal year, and up to two additional individuals who would have been the most highly compensated but for the fact that the individual was not serving as an executive officer at the end of the last completed fiscal year.

(3) The disclosure provided pursuant to this paragraph (x) must be provided in an Interactive Data File as required by 17 CFR 232.405 (Rule 405 of Regulation S–T) in accordance with the EDGAR Filer Manual.

■ 3. Add § 229.408 to read as follows:

§ 229.408 (Item 408) Insider trading arrangements and policies.

(a)(1) Disclose whether, during the registrant's last fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report), any director or officer (as defined in § 240.16a–1(f) of this chapter) adopted or terminated:

(i) Any contract, instruction or written plan for the purchase or sale of securities of the registrant intended to satisfy the affirmative defense conditions of Rule 10b5–1(c) (§ 240.10b5–1(c) of this chapter) (a ''Rule 10b5–1 trading arrangement''); and/or

(ii) Any ''non-Rule 10b5–1 trading arrangement'' as defined in paragraph (c) of this section.

(2) Identify whether the trading arrangement is intended to satisfy the affirmative defense of Rule 10b5–1(c), and provide a description of the material terms, other than terms with respect to the price at which the individual executing the Rule 10b5–1 trading arrangement or non-Rule 10b5–1 trading arrangement is authorized to trade, such as:

(A) The name and title of the director or officer;

(B) The date on which the director or officer adopted or terminated the trading arrangement;

(C) The duration of the trading arrangement; and

(D) The aggregate number of securities to be purchased or sold pursuant to the trading arrangement.

(3) The disclosure provided pursuant to paragraphs (a)(1) and (2) of this section must be provided in an Interactive Data File as required by 17 CFR 232.405 (Rule 405 of Regulation S–T) in accordance with the EDGAR Filer Manual.

(b)(1) Disclose whether the registrant has adopted insider trading policies and procedures governing the purchase, sale, and/or other dispositions of the registrant's securities by directors, officers and employees, or the registrant itself, that are reasonably designed to promote compliance with insider trading laws, rules and regulations, and any listing standards applicable to the registrant. If the registrant has not adopted such policies and procedures, explain why it has not done so.

(2) If the registrant has adopted insider trading policies and procedures, the registrant must file such policies and procedures as an exhibit. If all of the registrant's insider trading policies and procedures are included in its code of ethics (as defined in 17 CFR 229.406(b)) and the code of ethics is filed as an exhibit pursuant to 17 CFR 229.406(c)(1), that would satisfy the exhibit requirement of this paragraph.

(3) The disclosure provided pursuant to paragraph (b)(1) of this section must be provided in an Interactive Data File as required by 17 CFR 232.405 in accordance with the EDGAR Filer Manual.

(c) For purposes of this Item 408, a director or officer (as defined in § 240.16a–1(f) of this chapter) (each a ''covered person'') has entered into a *non-Rule 10b5–1 trading arrangement* where:

(1) The covered person asserts that at a time when they were not aware of material nonpublic information about the security or the issuer of the security they had adopted a written arrangement for trading the securities; and

(2) The trading arrangement:

(i) Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;

(ii) Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; or

(iii) Did not permit the covered person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the trading arrangement, did exercise such influence must not have been aware of material nonpublic information when doing so.

■ 4. Amend § 229.601 by:

■ a. In the exhibit table in paragraph (a), revising entry 19; and

■ b. Adding paragraph (b)(19).

The revisions read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

EXHIBIT TABLE

	Securities act forms										Exchange act forms					
	S–1	S–3	SF–1	SF–3	S–4[1]	S–8	S–11	F–1	F–3	F–4[1]	10	8–K[2]	10–D	10–Q	10–K	ABS–EE
*		*		*			*		*			*		*		
(19) Insider trading policies and procedures	x1	x1	x1	x1	x1	x1	x1	x1	x1	x1	x1	x1	x1	x1	X	

EXHIBIT TABLE—Continued

	Securities act forms										Exchange act forms					
	S–1	S–3	SF–1	SF–3	S–4[1]	S–8	S–11	F–1	F–3	F–4[1]	10	8–K[2]	10–D	10–Q	10–K	ABS–EE
*	*		*		*		*		*		*		*			

[1] An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S–4 or F–4 to provide information about such company at a level prescribed by Form S–3 or F–3; and (2) the form, the level of which has been elected under Form S–4 or F–4, would not require such company to provide such exhibit if it were registering a primary offering.

[2] A Form 8–K exhibit is required only if relevant to the subject matter reported on the Form 8–K report. For example, if the Form 8–K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

* * * * *

(b) * * *

(19) *Insider trading policies and procedures.* Any insider trading policies and procedures, or amendments thereto, that are the subject of the disclosure required by § 229.408(b) (Item 408(b) of Regulation S–K).

* * * * *

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 5. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 80b–4, 80b–10, 80b–11,7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 6. Amend § 232.405 by adding paragraph (b)(4)(iii) to read as follows:

§ 232.405 Interactive Data File Submissions.

* * * * *

(b) * * *

(4) * * *

(iii) Any disclosure provided in response to: § 229.402(x) of this chapter (Item 402(x) of Regulation S–K); § 229.408(a)(1) and (2) of this chapter (Item 408(a)(1) and (2) of Regulation S–K); § 229.408(b)(1) of this chapter (Item 408(b)(1) of Regulation S–K); and Item 16J(a) of § 249.220f of this chapter (Item 16J(a) of Form 20–F).

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 7. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 8. Amend § 240.10b5–1 by:

■ a. Removing the Preliminary Note;

■ b. Revising paragraphs (a), (b), (c)(1)(i), and (c)(1)(ii); and

■ c. Adding paragraph (c)(1)(iv).

The revisions and additions read as follows:

§ 240.10b5–1 Trading on the basis of material nonpublic information in insider trading cases.

(a) *Manipulative or deceptive devices.* The ''manipulative or deceptive device[s] or contrivance[s]'' prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b–5 (Rule 10b–5) thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

(b) *Awareness of material nonpublic information.* Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is on the basis of material nonpublic information for purposes of Section 10(b) and Rule 10b–5 if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b–5, and Rule 10b5–1 does not modify the scope of insider trading law in any other respect.

(c) *** (1)(i) Subject to paragraph (c)(1)(ii) of this section, a person's purchase or sale is not on the basis of material nonpublic information if the person making the purchase or sale demonstrates that:

(A) Before becoming aware of the information, the person had:

(*1*) Entered into a binding contract to purchase or sell the security,

(*2*) Instructed another person to purchase or sell the security for the instructing person's account, or

(*3*) Adopted a written plan for trading securities;

(B) The contract, instruction, or plan described in paragraph (c)(1)(i)(A) of this section:

(*1*) Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;

(*2*) Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; or

(*3*) Did not permit the person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the contract, instruction, or plan, did exercise such influence must not have been aware of the material nonpublic information when doing so; and

(C) The purchase or sale that occurred was pursuant to the contract, instruction, or plan. A purchase or sale is not ''pursuant to a contract, instruction, or plan'' if, among other things, the person who entered into the contract, instruction, or plan altered or deviated from the contract, instruction, or plan to purchase or sell securities (whether by changing the amount, price, or timing of the purchase or sale), or entered into or altered a corresponding or hedging transaction or position with respect to those securities.

(ii) Paragraph (c)(1)(i) of this section is applicable only when:

(A) The contract, instruction, or plan to purchase or sell securities was given or entered into in good faith and not as part of a plan or scheme to evade the prohibitions of this section, and the person who entered into the contract, instruction, or plan has acted in good faith with respect to the contract, instruction or plan;

(B) If the person who entered into the contract, instruction, or plan is:

(*1*) A director or officer (as defined in § 240.16a–1(f) (Rule 16a–1(f)) of the issuer, no purchases or sales occur until expiration of a cooling-off period consisting of the later of:

(*i*) Ninety days after the adoption of the contract, instruction, or plan or

(*ii*) Two business days following the disclosure of the issuer's financial results in a Form 10–Q (§ 249.308a of this chapter) or Form 10–K (§ 249.310 of this chapter) for the completed fiscal quarter in which the plan was adopted or, for foreign private issuers, in a Form 20–F (§ 249.220f of this chapter) or Form 6–K (§ 249.306 of this chapter) that discloses the issuer's financial results (but, in any event, this required cooling-off period is subject to a maximum of 120 days after adoption of the contract, instruction, or plan); or

(*2*) Not the issuer and not a director or officer (as defined in § 240.16a–1(f) (Rule 16a–1(f)) of the issuer, no purchases or sales occur until the expiration of a cooling-off period that is 30 days after the adoption of the contract, instruction or plan;

(C) If the person who entered into a plan as described in paragraph (c)(1)(i)(A)(3) of this section is a director or officer (as defined in Rule 16a–1(f) (§ 240.16a–1(f)) of the issuer of the securities, such director or officer included a representation in the plan certifying that, on the date of adoption of the plan:

(*1*) The individual director or officer is not aware of any material nonpublic information about the security or issuer; and

(*2*) The individual director or officer is adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of this section;

(D) The person (other than the issuer) who entered into the contract, instruction, or plan has no outstanding (and does not subsequently enter into any additional) contract, instruction, or plan that would qualify for the affirmative defense under paragraph (c)(1) of this section for purchases or sales of the issuer's securities on the open market; except that:

(*1*) For purposes of this paragraph (c)(1)(ii)(D), a series of separate contracts with different broker-dealers or other agents acting on behalf of the person (other than the issuer) to execute trades thereunder may be treated as a single ''plan,'' provided that the individual constituent contracts with each broker-dealer or other agent, when taken together as a whole, meet all of the applicable conditions of and remain collectively subject to the provisions of this rule, including that a modification of any individual contract acts as modification of the whole contract, instruction of plan, as defined in paragraph (c)(1)(iv) of this section. The substitution of a broker-dealer or other agent acting on behalf of the person (other than the issuer) for another broker-dealer that is executing trades pursuant to a contract, instruction or plan shall not be a modification of the contract, instruction, or plan (as defined in paragraph (c)(1)(iv) of this section) as long as the purchase or sales instructions applicable to the substitute and substituted broker are identical with respect to the prices of securities to be purchased or sold, dates of the purchases or sales to be executed, and amount of securities to be purchased or sold; and

(*2*) The person (other than the issuer) may have one later-commencing contract, instruction, or plan for purchases or sales of any securities of the issuer on the open market under which trading is not authorized to begin until after all trades under the earlier-commencing contract, instruction, or plan are completed or expired without execution; provided, however, that if the first trade under the later-commencing contract, instruction, or plan is scheduled during the Effective Cooling-Off Period, the later-commencing contract, instruction, or plan may not rely on this paragraph (c)(1)(ii)(D)(*2*). For purposes of this paragraph (c)(1)(ii)(D)(*2*), ''Effective Cooling-Off Period'' means the cooling-off period that would be applicable under paragraph (c)(1)(ii)(B) of this section with respect to the later-commencing contract, instruction, or plan if the date of adoption of the later-commencing contract, instruction, or plan were deemed to be the date of termination of the earlier-commencing contract, instruction, or plan; and

(*3*) A contract, instruction, or plan providing for an eligible sell-to-cover transaction shall not be considered an outstanding or additional contract, instruction, or plan under paragraph (c)(1)(ii)(D) of this section, and such eligible sell-to-cover transaction shall not be subject to the limitation under paragraph (c)(1)(ii)(D) of this section. A contract, instruction, or plan provides for an eligible sell-to-cover transaction where the contract, instruction, or plan authorizes an agent to sell only such securities as are necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award, such as restricted stock or stock appreciation rights, and the insider does not otherwise exercise control over the timing of such sales; and

(E) With respect to persons (other than the issuer), if the contract, instruction, or plan does not provide for an eligible sell-to-cover transaction as described in paragraph (c)(1)(ii)(D)(*3*) of this section and is designed to effect the open-market purchase or sale of the total amount of securities as a single transaction, the person who entered into the contract, instruction, or plan has not during the prior 12-month period adopted a contract, instruction, or plan that:

(*1*) was designed to effect the open-market purchase or sale of all of the securities covered by such prior contract, instruction or plan, in a single transaction; and

(*2*) Would otherwise qualify for the affirmative defense under paragraph (c)(1) of this section.

* * * * *

(iv) Any modification or change to the amount, price, or timing of the purchase or sale of the securities underlying a contract, instruction, or written plan as described in paragraph (c)(1)(i)(A) of this section is a termination of such contract, instruction, or written plan, and the adoption of a new contract, instruction, or written plan. A plan modification, such as the substitution or removal of a broker that is executing trades pursuant to a Rule 10b5–1 arrangement on behalf of the person, that changes the price or date on which purchases or sales are to be executed, is a termination of such plan and the adoption of a new plan.

* * * * *

■ 9. Amend § 240.14a–101 by revising paragraph (b) introductory text of Item 7 to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 7. * * *

* * * * *

(b) The information required by Items 401, 404(a) and (b), 405, 407 and 408(b) of Regulation S–K (§§ 229.401, 229.404(a) and (b), 229.405, 229.407, and 229.408(b) of this chapter), other than the information required by:

* * * * *

■ 10. Amend § 240.16a–3 by revising paragraphs (f)(1)(i)(A) and (g)(1) to read as follows:

§ 240.16a–3 Reporting transactions and holdings.

* * * * *

(f) * * *

(1) * * *

(i) * * *

(A) Exercises and conversions of derivative securities exempt under either § 240.16b–3 or § 240.16b–6(b), dispositions by bona fide gifts exempt under § 240.16b–5, and any transaction exempt under § 240.16b–3(d), § 240.16b–3(e), or § 240.16b–3(f), (these are required to be reported on Form 4);

* * * * *

(g)(1) A Form 4 must be filed to report: All transactions not exempt from section 16(b) of the Act; all transactions exempt from section 16(b) of the Act pursuant to § 240.16b–3(d), § 240.16b–3(e), or § 240.16b–3(f); and dispositions by bona fide gifts and all exercises and conversions of derivative securities, regardless of whether exempt from section 16(b) of the Act. Form 4 must be filed before the end of the second business day following the day on which the subject transaction has been executed.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 11. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3) Pub. L. 112–106, 126 Stat. 309 (2012), Sec. 107 Pub. L. 112–106, 126 Stat. 313 (2012), Sec. 72001 Pub. L. 114–94, 129 Stat. 1312 (2015), and secs. 2 and 3 Pub. L. 116–222, 134 Stat. 1063 (2020), unless otherwise noted.

* * * * *

Section 249.220f is also issued under secs. 3(a), 202, 208, 302, 306(a), 401(a), 401(b), 406 and 407, Pub. L. 107–204, 116 Stat. 745, and secs. 2 and 3, Pub. L. 116–222, 134 Stat. 1063.

* * * * *

Section 249.308a is also issued under secs. 3(a) and 302, Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 249.310 is also issued under secs. 3(a), 202, 208, 302, 406 and 407, Pub. L. 107–204, 116 Stat. 745.

* * * * *

■ 12. Amend Form 4 (referenced in § 249.104) by:

■ a. Adding new General Instruction 10; and

■ b. Adding text and one check box at the top of the first page immediately below the text ''Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).''

The additions read as follows:

Note: The text of Form 4 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 4

* * * * *

General Instructions

* * * * *

10. Rule 10b5–1(c) Transaction Indication

Indicate by check mark whether a transaction was made pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer that is intended to satisfy the affirmative defense conditions of Rule 10b5–1(c) under the Exchange Act [§ 240.10b5–1(c) of this chapter]. Provide the date of adoption of the Rule 10b5–1(c) plan in the ''Explanation of Responses'' portion of the Form.

* * * * *

☐ Check this box to indicate that a transaction was made pursuant to a contract, instruction or written plan that is intended to satisfy the affirmative defense conditions of Rule 10b5–1(c). *See* Instruction 10.

* * * * *

■ 13. Amend Form 5 (referenced in § 249.105) by:

■ a. Adding new General Instruction 10; and

■ b. Adding text and one check box at the top of the first page immediately below the text ''Form 4 Transactions Reported''.

The additions read as follows:

Note: The text of Form 5 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 5

* * * * *

General Instructions

* * * * *

10. Rule 10b5–1(c) Transaction Indication

Indicate by check mark whether a transaction was made pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer that is intended to satisfy the affirmative defense conditions of Rule 10b5–1(c) under the Exchange Act [§ 240.10b5–1(c) of this chapter]. Provide the date of adoption of the Rule 10b5–1(c) plan in the ''Explanation of Responses'' portion of the Form.

* * * * *

☐ Check this box to indicate that a transaction was made pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer that is intended to satisfy the affirmative defense conditions of Rule 10b5–1(c). *See* Instruction 10.

* * * * *

■ 14. Amend Form 20–F (referenced in § 249.220f) by:

■ a. Adding new Item 16J; and

■ b. Revising exhibit 11.

The additions read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20–F

* * * * *

Item 16J. Insider trading policies

(a) Disclose whether the registrant has adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of the registrant's securities by directors, senior management, and employees that are reasonably designed to promote compliance with applicable insider trading laws, rules and regulations, and any listing standards applicable to the registrant. If the registrant has not adopted such policies and procedures, explain why it has not done so.

(b) If the registrant has adopted insider trading policies and procedures, the registrant must file such policies and procedures as an exhibit. If all of the registrant's insider trading policies and procedures are included in its code of ethics (as defined in Item 16B(b)) and the code of ethics is filed as an exhibit pursuant to Item 16B(c)(1), the registrant may satisfy the exhibit requirement of this paragraph by filing the code of ethics that would satisfy the exhibit requirement of Item 16B(c)(1).

(c) The disclosure provided pursuant to Item 16J(a) must be provided in an Interactive Data File as required by Rule 405 of Regulation S–T (17 CFR 232.405) in accordance with the EDGAR Filer Manual.

Instruction to Item 16J: Item 16J applies only to annual reports, and does not apply to registration statements, on Form 20–F.

* * * * *

Instructions as to Exhibits

* * * * *

11. (a) Any code of ethics, or amendment thereto, that is the subject of the disclosure required by Item 16B of Form 20–F, to the extent that the registrant intends to satisfy the Item 16B requirements through filing of an exhibit

(b) Any insider trading policies and procedures that is the subject of the disclosure required by Item 16J. If all of the registrant's insider trading policies and procedures are included in its code of ethics and the code of ethics is filed as an exhibit, that exhibit filing would

satisfy the exhibit requirement of this paragraph (b).

* * * * *

■ 15. Amend Form 10–Q (referenced in § 249.308a) by adding paragraph (c) to Item 5 in Part II to read as follows:

Note: The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 10–Q

* * * * *

Part II—Other Information

* * * * *

Item 5. Other Information.

* * * * *

(c) Furnish the information required by Item 408(a) of Regulation S–K (17 CFR 229.408(a)).

* * * * *

■ 16. Amend Form 10–K (referenced in § 249.310) by revising Item 9B in Part II and Item 10 in Part III to read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 10–K

* * * * *

Part II

Item 9B. Other Information.

* * * * *

Furnish the information required by Item 408(a) of Regulation S–K (§ 229.408(a) of this chapter).

* * * * *

Part III

* * * * *

Item 10. Directors, Executive Officers and Corporate Governance.

Furnish the information required by Items 401, 405, 406, 407(c)(3), (d)(4), (d)(5), and 408(b) of Regulation S–K (§ 229.401, § 229.405, § 229.406, § 229.407(c)(3), (d)(4), (d)(5), and § 229.408(b) of this chapter).

* * * * *

By the Commission.

Dated: December 14, 2022.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2022–27675 Filed 12–28–22; 8:45 am]

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